IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF: KEVIN WAYNE FRANKLIN, Petitioner.	NO. 47514-6 STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should this petition be dismissed where the defendant's grounds for relief were raised or could have been raised in his direct appeal, where they are supported only by newly revised legal arguments, and where they lack sufficient evidentiary support to sustain the defendant's collateral attack burdens of production and proof?

2. Should this petition be dismissed as to the ineffective appellate assistance and cumulative error grounds where the grounds lack sufficient evidentiary support to sustain the defendant's burdens of production and proof and where the only support offered are newly revised legal arguments?

B. STATUS OF PETITIONER:

Petitioner Kevin Wayne Franklin (the "defendant") is restrained pursuant to a judgement and sentence entered in Pierce County Superior Court on April 22, 2011.

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Appendix A. The defendant had originally been charged with two felony offenses on June 1, 2009, stemming from an incident in which multiple shots were fired at and from several vehicles in what could be described as a rolling gang gunfight[1]. Appendix B. The defendant was convicted of three offenses, drive-by shooting in Count One, first degree unlawful firearm possession in Count Two, and first degree assault in Count Three together with firearm sentence enhancements and gang membership aggravating circumstances. Appendix A. On April 22, 2011, the defendant was sentenced to a low to midrange sentence of 140 months in prison plus 60 months for the firearm sentence enhancement. *Id.* The defendant filed a notice of appeal the same day.

The defendant's direct appeal was completed on October 21, 2013. Appendices C and D. In an unpublished opinion, this Court affirmed the defendant's convictions. Appendix C. The appeal addressed primary issues related to admissibility and sufficiency of the evidence. *Id.* In addition, the Court's discussion addressed related issues such as admissibility of ER 404(b) evidence, gang evidence, accomplice liability, and opinion testimony. *Id.*

This is the defendant's first personal restraint petition. It was timely filed on May 1, 2015, after the defendant's unsuccessful petition for a writ of certiorari was denied by the United States Supreme Court on May 27, 2014.

[1] As will be argued below, the Court should dismiss this petition as an improper attempt at a second appeal. Without waiving its procedural arguments and objections, the State will submit a motion to transfer the record from the defendant's direct appeal, since that record would be relevant if the Court were to reach the merits of any of the defendant's claims. Needless to say the defendant did not provide the court with the record from the appeal even though he relies almost entirely on it. The motion should not be considered a concession of the defendant's collateral attack burdens of production and proof nor relieve the defendant of those burdens.

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C. ARGUMENT:

1. THIS PETITION SHOULD BE DISMISSED WHERE THE DEFENDANT'S GROUNDS FOR RELIEF WERE RAISED OR COULD HAVE BEEN RAISED IN HIS DIRECT APPEAL, AND WHERE THEY HAVE BEEN SUPPORTED ONLY BY REFORMULATED LEGAL ARGUMENTS.

The following general discussion applies to all of the defendant's grounds for relief except number seven, ineffective assistance of appellate counsel. As a general rule, "collateral attack by [personal restraint petition] on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant." ***In re Personal Restraint of Gentry***, 137 Wn.2d 378, 388-389, 972 P.2d 1250 (1999). A personal restraint petitioner is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue. *Id.* at 388, ***In re Personal Restraint of Lord***, 123 Wn.2d 296, 303, 868 P.2d 835 (1994), ***In re Hegney***, 138 Wn. App. 511, 544, 158 P.3d 1193, 1209 (2007) ("Finally, we take seriously that collateral attacks should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant."). The interests of justice are served by reexamining an issue only if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. ***In re Personal Restraint of Stenson***, 142 Wn.2d 710, 720, 16 P.3d 1 (2001) ("A defendant may not recast the same issue as an ineffective assistance claim; simply recasting an argument in that manner does not create a new ground for relief or constitute good cause for reconsidering the previously rejected claim."), citing ***In re Personal Restraint of Benn***, 134 Wn.2d 868, 906, 952 P.2d 116 (1998).

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Also as a general rule, issues that were previously raised cannot be reformulated through new legal arguments. "This court from its early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case." ***State v. Bailey***, 35 Wn. App. 592, 594, 668 P.2d 1285 (1983), quoting ***Davis v. Davis***, 16 Wn.2d 607, 609, 134 P.2d 467 (1943), ***State v. Corrado***, 94 Wn. App. 228, 236, 972 P.2d 515, 518 (1999) ("But an issue that was raised or could have been raised in a previous appeal may not be raised in a later appeal of the same case."). Because the personal restraint petition process is not a substitute for appeal, the defendant cannot raise a valid issue on collateral attack by simply revising an issue raised and rejected on direct appeal. On this issue, the Washington Supreme Court has stated:

> Simply 'revising' a previously rejected legal argument, however, neither creates a 'new' claim nor constitutes good cause to reconsider the original claim. As the Supreme Court observed in [***Sanders v. United States***, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)], "identical grounds may often be proved by different factual allegations. So also, identical grounds may be supported by different legal arguments, . . . or be couched in different language, . . . or vary in immaterial respects". (Citations omitted.) ***Sanders v. United States***, *supra* at 16, 83 S. Ct. at 1077. Thus, for example, "a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on physical coercion". ***Sanders***, at 16, 83 S. Ct. at 1077.

Matter of Jeffries, 114 Wn. 2d 485, 488, 789 P.2d 731 (1990). Furthermore, the Supreme Court and this Court have both stated:

> We take seriously the view that a collateral attack by PRP on a criminal conviction and sentence should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant.

In re Personal Restraint of Gentry, 137 Wn. 2d at 388-389, ***In re Personal Restraint of Hegney***, 138 Wn. App. 511, 543-544, 158 P. 3d 1193 (2007).

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Review of the defendant's eight grounds for relief reveals that this is an attempt at a second appeal. All eight of the proffered grounds for relief, with the possible exception of the first, purport to be based on the same record as the direct appeal. In his arguments, the defendant attempts to raise issues (1) that were previously raised and rejected in the defendant's direct appeal, or (2) that have been reformulated via additional legal arguments, or (3) that could have been raised but were inexplicably not in the direct appeal. Under the above standards the defendant's arguments are not well taken. Accordingly the petition should be dismissed.

a. The defendant's right to a public trial was not challenged in his direct appeal but could have been, and thus is not properly subject to collateral attack, and furthermore the defendant has not sustained his collateral attack burden of proof as to this issue.

In this case as to ground number one, the defendant claims a public trial violation during jury selection. This is a ground for relief that could have been included in his direct appeal but was not. Therefore, under ***Gentry*** and the authorities discussed above the defendant is unable to show that this issue "could not have been raised in the principal action, to the prejudice of the defendant." ***In re Personal Restraint of Gentry***, 137 Wn. 2d at 388-389. For this reason alone this petition should be dismissed as to this ground for relief as it is an attempt at an improper second appeal. ***In re Personal Restraint of Taylor***, 105 Wn. 2d 683, 687-88, 717 P. 2d 755 (1986).

In the event the Court declines to dismiss as to this ground for relief, for the sake of argument, it can be shown that no public trial violation occurred. The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

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"There is a strong presumption that courts are to be open at all trial stages." ***State v. Lormor***, 172 Wn.2d 85, 90, 257 P.3d 624 (2011).

The right to a public trial includes *voir dire*. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). However the public trial right applies "*only* to a specific component of jury selection -- i.e., the '*voir dire*' of prospective jurors who form the venire. . . ." ***State v. Wilson***, 174 Wn. App. 328, 338, 298 P.3d 148 (2013) (emphasis in the original). *See* ***State v. Love***, 183 Wn. 2d 598, 607, 354 P.3d 841 (2015) ("We hold the procedures used at Love's trial comport with the minimum guarantees of the public trial right and find no closure here.").

Public trial decisions also state that "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." ***State v. Sublett***, 176 Wn.2d at 71. Rather, the decisions in ***State v. Paumier***, 176 Wn.2d 29, 288 P.3d 1126 (2012), ***State v. Wise***, 176 Wn.2d 1,288 P.3d 1113 (2012), and ***State v. Sublett***, 176 Wn.2d 58, 292 P.3d 715 (2012):

> appear to articulate two steps for determining the threshold issue of whether a particular proceeding implicates a defendant's public trial right, thereby requiring a *Bone–Club* analysis before the trial court may "close" the courtroom: First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy *Sublett*'s "experience and logic" test?

State v. Wilson, 174 Wn. App. 328, 335, 298 P.3d 148 (2013).

The ***Sublett*** "experience and logic" test was first articulated by the United States Supreme Court in ***Press-Enterprise Co. v. Superior Court***, 478 U.S. 1,8,106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), and states:

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both

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> is yes, the public trial right attaches and the ***Waller*** or ***Bone-Club*** factors must be considered before the proceeding may be closed to the public.

State v. Sublett, 176 Wn.2d at 73.

Even where a public trial issue meets the two-part test, it may be subordinated to other trial rights, particularly the right to an impartial jury. ***State v. Momah***, 167 Wn. 2d 140, 152-53, 217 P.3d 321 (2009) ("As we have stated in instances where article I, sections 10 and 22 were in conflict: we must harmonize the right to a public trial with the right to an impartial jury), citing ***Federated Publications, Inc. v. Kurtz***, 94 Wn.2d 51, 61, 615 P.2d 440 (1980).

In this case ground number one does not meet the ***Sublett*** two-part test. The defendant alleges a public trial violation as to two prospective jurors. Petition, p. 2. He refers to an incomplete excerpt of the trial court's minute entry from the *voir dire* proceedings. The complete minutes show that the trial court was mindful of conducting *voir dire* in open court and only deviated where other rights of the defendant were at stake. Appendix E, pp 5-9.

All private questioning of jurors for hardship was done in open court. Appendix E, pp. 7-8. This is evident because the defendant's supporters were present. *Id.* Except where the defendant's family or supporters were alleged to have had improper contact with a juror, questioning was done in the presence of the defendant and his supporters but outside the presence of the rest of the jury. Whatever may be said of the experience and logic test, there was no public trial violation.

In addition to hardship *voir dire*, the trial court also dealt with several unusual circumstances during jury selection. These had the potential of implicating the defendant's right to an impartial jury. Each time the trial court provided a public announcement of the issue and the action taken. Appendix E, pp. 7-8 of 44. This was consistent with appropriate jury selection procedure and was similar to peremptory challenges the

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approved mode of exercising peremptory challenges using a challenge sheet. *See* ***State v. Marks***, 185 Wn. 2d 143, 368 P.3d 485, 486 (2016) ("[P]eremptory challenges are part of the jury selection process to which the right to a public trial extends, but we determined that when the challenges are exercised in open court and a public record is made of the challenged jurors, no courtroom closure in violation of the public trial right occurs."). Again, whatever may be said of the ***Sublett*** two-part test, the trial court's handling of the out-of-the-ordinary circumstances that arose during jury selection complied with the defendant's public trial right.

One of the complained of circumstances involved Juror No. 51. In that instance, the trial court was made aware that the defendant's family or supporters may have had inappropriate contact with certain panel members. Appendix E, pp. 7-8. This was investigated in open court in the defendant's presence but in the absence of the involved supporters of the defendant. The trial court cautiously adopted this procedure only after having discussing with the parties "regarding asking the family members to step outside while Juror # 51 is brought up for private questioning." Appendix E, p.8. The court also took a recess to consider case law concerning appropriate action to be taken. *Id.* Under these circumstances, it can hardly be said that the trial court's concern for jury impartiality was addressed by an impermissible procedure. ***State v. Momah***, 167 Wn. 2d at 152-53.

In a collateral attack involving a defendant's public trial right, the defendant has the burden of satisfying the experience and logic test. ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 29, 296 P. 3d 872 (2013). Here the defendant has offered nothing that suggests improper trial court action during jury selection, accordingly, even if the court does not consider this issue to be subject to dismissal as an improper second appeal, the court should nevertheless dismiss the issue as unsupported by sufficient evidence.

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b. The search warrant was not challenged in the defendant's direct appeal but could have been, and thus is not properly subject to collateral attack, and furthermore the defendant has not sustained his collateral attack burden of proof as to this issue.

In this case as to ground number two, the defendant argues that evidence gathered via a search warrant was improperly admitted. This is a ground for relief that could have been included in his direct appeal but was not. Under ***Gentry, Taylor*** and the collateral attack authorities discussed above, this ground constitutes an improper second appeal. For this reason the petition should be dismissed as to ground number two.

For the sake of argument, in the event that the court does not dismiss ground number two, the defendant's arguments are not valid. The search warrant complained of was the subject of a pretrial suppression motion that resulted in the entry of findings of fact and conclusions of law. Appendix H. The findings and conclusions were not challenged in the direct appeal. Moreover, review of the warrant affidavit shows that it was not based on a confidential informant as the defendant claims. *Id.* Instead, it was based on named, identified individuals and more than supported probable cause.

Review of the findings and conclusions reveals no legitimate overbreadth issue. The warrant included the crime that was under investigation and the materials to be searched for and seized as was required. ***State v. Wible***, 113 Wn. App. 18, 28, 51 P.3d 830, 837 (2002) (Search warrant for sexually explicit materials not overbroad because "this is not a situation where the warrant authorized the seizure of a broad category of materials without specifying the crime under investigation."). The defendant has made no showing to the contrary.

A personal restraint petitioner is required to provide "the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations. . . ." RAP 16.7(a)(2)(i). This requirement means that a "petitioner

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must state with particularity facts which, if proven, would entitle him to relief." ***In Re: Personal Restraint of Rice***, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Bald assertions and conclusory allegations will not support the holding of a [reference] hearing." *Id.* ***Matter of Cook***, 114 Wn.2d 802, 813–14, 792 P.2d 506 (1990) ("Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies solely on conclusory allegations, a court should decline to determine the validity of a personal restraint petition."), citing ***In Re: Personal Restraint of Williams***, 111 Wn.2d 353, 364–65, 759 P.2d 436 (1988).

To obtain relief in a personal restraint petition challenging a judgment and sentence, the petitioner must show (1) actual and substantial prejudice resulting from alleged constitutional errors, or, (2) a fundamental defect that inherently results in a miscarriage of justice in case of alleged non-constitutional error. ***Matter of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). "After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence." *Id.,* citing ***In Re: Hews***, 99 Wn.2d 80, 89, 660 P.2d 263 (1983). ***In re Personal Restraint of Borrero***, 161 Wn. 2d 532, 536, 167 P. 3d 1106 (2007).

In this case as to the overbreadth issue, the defendant has not established actual and substantial prejudice resulting from constitutional error as required by ***Cook.*** Moreover, as to the so-called ***Aguillar Spinelli***[2] issue, the defendant has not shown that probable cause was based solely on information from an unnamed, anonymous, confidential informant for which there was insufficient information to establish veracity and basis of knowledge.

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[2] ***Aguilar v. Texas,*** 378 U.S. 108, 114, 84 S. Ct. 1509, 1514, 12 L. Ed. 2d 723 (1964), ***Spinelli v. United States***, 393 U.S. 410, 416, 89 S. Ct. 584, 589, 21 L. Ed. 2d 637 (1969).

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Rather the search warrant was based almost entirely on information from named, identified individuals. There is no basis for either claim of the defendant in ground number two.

c. This Court correctly decided the evidence admissibility issues in the defendant's direct appeal and no showing has been made that the interests of justice would be served by re-examining those issues in a collateral attack.

The interests of justice are served by reexamining an issue only if there has been an intervening change in the law or some other justification for having failed previously to raise a crucial point or argument. ***In re Personal Restraint of Stenson***, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). In this case the defendant candidly admits that he is requesting "re-examining this ground that was [previously] raised on direct appeal and denied." Petition, p.6. What he fails to show is that the law has changed in some way to his benefit. In the absence of such a showing, this ground for relief has been conclusively decided.

A personal restraint petition should be dismissed if the same issue was previously "heard and determined". ***In re Haverty***, 101 Wn.2d 498, 681 P.2d 835 (1984). For an issue to have been previously "heard and determined", it must be shown that: (1)[T]he same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. ***Haverty***, at 503, quoting ***Sanders v. United States,*** 373 U.S. 1, 15, 83 S. Ct. 1068, 1077, 10 L. Ed. 2d 148(1963). ***In re Personal Restraint of Taylor***, 105 Wn. 2d 683, 687, 717 P. 2d 755 (1986). A petitioner cannot be allowed to institute appeal upon appeal and review upon review in forum after forum ad infinitum. ***Taylor***, at 688. The appellate court should dismiss a petition if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits. Prior "ground" means a distinct legal basis for granting relief. ***Sanders v. United States,*** 373 U.S. at 16, 83 S. Ct. at 1077 ("By 'ground,' we mean simply a sufficient legal basis for granting the relief

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sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief."),

All three of the elements of heard and determined are present in this case. First, the defendant admits that he is presenting the same ground for relief. Second, this Court decided the evidentiary issues on the merits in the direct appeal. Appendix C. Finally, there has been no attempt to show an intervening change in the law or any other valid reason for revisiting these issues. Accordingly as to ground number three, this petition should be dismissed.

If the Court determines that ground number three should not be dismissed as heard and determined, it should nevertheless be dismissed as insufficiently supported. In regard to the evidentiary issues the defendant has not sustained his burden of production whereby he must show under ***Cook*** actual and substantial prejudice resulting from alleged constitutional errors. He has made no showing that the evidentiary issues are constitutional in nature, much less that he has suffered actual and substantial prejudice.

d. The accomplice and other challenged instructions were not challenged in the defendant's direct appeal but could have been and thus are not properly subject to collateral attack, and furthermore the defendant has not sustained his collateral attack burden of proof as to this issue.

In this case as to ground number four, the defendant argues that various jury instructions were improper. This is a ground for relief that could have been included in his direct appeal but was not. Under ***Gentry, Taylor*** and the other authorities discussed above, the defendant has attempted an improper second appeal. For this reason the petition should be dismissed as to ground number four.

For the sake of argument, in the event that the Court does not dismiss ground number four, the defendant's arguments are not well taken. The defendant has made no showing that the challenged jury instructions were improper. Appendix F. The jury

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instructions were not challenged in the direct appeal but sufficiency of the evidence was. In order to issue a decision on sufficiency, this Court necessarily had to consider the elements of the crimes together with complicity, knowledge and recklessness. *See* Petition, pp. 9-14. Had there been any defect in the instructions, it is inconceivable that the defect would not have been addressed as part of the decision on the merits of the insufficiency claim. No such discussion was included in the Court's opinion. Appendix C. This supports the view that the instructions were a complete, correct and sufficient statement of the law.

As to the content of the instructions, the defendant wholly fails to present any authority to support his position. As to the accomplice instruction, the defendant cites to the statute and claims it differs from the instruction. Yet he fails to identify a material difference that "relieved the State of its Constitutional burden to prove every 'element' of the crimes charged." Petition, p. 11. A defendant must show actual and substantial prejudice resulting from alleged constitutional error. ***Matter of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Where the defendant has not identified a material difference, nor identified facts which could demonstrate that he suffered "actual and substantial prejudice", his petition should be dismissed.

To have successfully proved that a defendant was an accomplice "the jury must find actual knowledge but may make such a finding with circumstantial evidence." ***State v. Allen***, 182 Wn. 2d 364, 374, 341 P.3d 268 (2015), citing ***State v. Shipp,*** 93 Wn.2d 510, 610 P.2d 1322 (1980). This is exactly what the knowledge instruction in this case says. It provided: "A person knows or acts knowingly with respect to a fact when he or she is aware of that fact." Appendix F, Instruction 17. The knowledge instruction was incorporated in the accomplice instruction which identified the fact that must be proved,

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namely that the defendant acted with actual "knowledge" in the commission of the crime. Appendix F, Instruction 9. Actual knowledge was required to be proved and was proved.

The complained of assault and reckless instructions were likewise proper. The defendant complains of the assault definition instruction, but failed to cite or discuss the great bodily harm definition or the elements instruction. Petition, p. 14. Instruction 24 defined great bodily harm according to the definition from Washington's pattern instructions. Appendix F, Instruction 24. Instruction 26 included great bodily harm as a required element of first degree assault. Appendix F, Instruction 26. The defendant's claim that the State was relieved of its burden is not well taken.

The same may be said of recklessness. The defendant cites the recklessness definition instruction but not the elements of drive-by shooting. Contrary to the defendant's argument, the elements instruction required the State to prove beyond a reasonable doubt all of the elements of drive-by shooting. In particular that the discharge of a firearm "created a substantial risk of death or serious physical injury to another person." Appendix F, Instruction 14. *See* RCW 9A.36.045(1). No error is even alleged as to Instruction 14, the defendant simply neglected to discuss it.

In his direct appeal, this Court correctly determined that sufficient evidence supported the defendant's convictions. No valid instructional error was argued or sustained in the defendant's direct appeal. No valid instructional error has been brought forward in this petition. Accordingly where the defendant has failed to sustain his burden on collateral attack, this petition as to ground number four should be dismissed.

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e. The prosecution's closing argument was not challenged in the defendant's direct appeal but could have been and thus is not properly subject to collateral attack, and furthermore the defendant has not sustained his collateral attack burden of proof as to this issue.

This ground for relief could have been raised in the defendant's direct appeal but was not. Like his prior grounds, it constitutes an improper attempt at a second appeal under ***Gentry, Taylor*** and the other authorities discussed above. For this reason alone, this petition should be dismissed as to this ground for relief as an attempt at an improper second appeal.

In the event the Court reaches the merits, the standard of review for allegedly improper comments during closing argument requires that the comments be reviewed in context. ***State v. Russell***, 125 Wn.2d 24, 882 P.2d 747 (1994). The comments are examined in light of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Id.* at 86. ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). ***State v. Boehning***, 127 Wn. App. 511, 519, 111 P.3d 899 (2005) ("We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions."), ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (Reversal for prosecutorial error requires review of the context of the entire case.)

In making an assessment of a prosecutor's closing argument, it is worth noting that a prosecutor is permitted latitude to argue the facts in evidence draw reasonable inferences from the evidence and express those inferences to the jury. ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), citing ***State v. Hoffman***, 116 Wn.2d51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998), and ***State v. Fiallo–Lopez***, 78 Wn. App.

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717, 726, 899 P.2d 1294 (1995). A prosecutor may also argue the jury instructions without misstatement of the law. ***State v. Allen***, 182 Wn.2d 364, 341 P.3d 268, 273 (2015).

A defendant who alleges prosecutorial error[3] must first establish that the prosecutor's conduct was improper. ***State v. Emery***, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Once a defendant meets this threshold, the court must determine whether the defendant was prejudiced. *Id.* at 760. Where no objection is made at trial, a defendant is deemed to have waived any error. *Id. at* 760-61.

Review of alleged prosecution error is also affected by the presence or absence of objection at trial. If prosecutor error is established, and if the defendant objected at trial, the court must still determine if there was a substantial likelihood that the prosecutor's misconduct prejudiced the defendant by affecting the jury's verdict. ***State v. Emery***, 174 Wn.2d at 760. If the defendant did not object at trial, he "is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760–61.

A defendant is prejudiced if there is a substantial likelihood that the misconduct affected the jury's verdict. ***In re Pers. Restraint of Glasmann***, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Prejudice from allegedly improper prosecution argument is established

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[3]'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937(2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10,(2010), http://www.americanbar.org/content/dam/aba /migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited June 9, 2016); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited June 9, 2016).

A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See*, e.g., ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

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only where "there is a substantial likelihood that the instances of misconduct affected the jury's verdict." ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Through his citations to prosecutorial error cases, the defendant identified five potential bases for his prosecutorial error argument. The petition did not relate four of the cases to the facts, record or argument in this case. It is evident that with the exception of his primary argument, namely the alleged declare the truth argument, the defendant has not sustained his burdens of production and persuasion as articulated by ***Cook***.

As to the declare the truth argument, the defendant has not sustained his burden of proof concerning that argument either. It would have been improper for the prosecutor to suggest that the jury should declare the truth through its verdict. ***State v. Emery***, 174 Wn. 2d. at 760 ("The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth. . . Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt."), citing ***State v. Anderson***, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), and ***In re: Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The prosecutor made no such argument and thus did not commit error.

First, the complained of, out-of-context excerpts proffered by the defendant were lifted from the section of the closing argument that dealt with the elements of the crimes. The prosecutor used the court's actual instructions as a visual aid and while doing so urged the jury to weigh the evidence and apply the instructions to determine if the elements had been proved beyond a reasonable doubt:

> So in this to convict, it says, under No. 1, on the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman. You have to find the truth of that beyond a reasonable doubt. If in any one of these elements, you can't come to a truth that was proved, then it's not guilty. You're going to have doubts about, especially in this case, certain aspects of what happened. Who told the truth on the stand. I mean, that's

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> going to be a tough one for you. Who was telling the truth out there when they were talking to law enforcement, and what parts of what they were saying were true? What parts were to protect themselves from criminal liability; what parts were to protect others?
>
> Appendix G, p.1796.

The prosecutor in the above example uttered the word truth but not in an impermissible way. To utter the word truth or any derivative of it in closing argument is not prosecutorial error. No case has held that it is. Considering American judicial history and the fact finding function of trial courts, would it not be astounding if a case did? The argument above, in which the word truth was used, was an argument about the need for proof beyond a reasonable doubt as to an element of one of the crimes. This was no more improper than the contrasting defense argument that the evidence was not sufficient proof beyond a reasonable doubt.

The defendant cannot sustain the first requirement of a prosecutorial error, namely actual error, by mischaracterizing a prosecution argument. In addition to using the word truth in connection with the elements of the crimes, the prosecutor likewise used the word in connection with reasonable doubt. This too was in connection with the court's actual instruction:

> Beyond a reasonable doubt, you come in here, you know nothing about the case. Now you do. The definition says, when you have an abiding belief in the truth of the charge, you're convinced beyond a reasonable doubt. If you remember, I asked those of you that have been on a jury before, as you sit here today and look back on that case or those cases, are you still satisfied in the truth of that decision? Despite whatever doubts or issues that came up, do you still believe you got it right based on the standard, based on the facts? Everyone said yes. Doesn't matter what the answer is, but the verdict - - but everyone said yes. That's what it means. You have to get there. You have to consider this case and despite whatever issues, you can't actually come to 100 percent resolution on.
>
> Appendix G, p. 1812.

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Throughout the argument the prosecutor focused on the primary issues, namely credibility and proof beyond a reasonable doubt. His arguments using the word truth were no different, and just as permissible as the arguments offered by the defense attorney, who said:

> Certainly true of Detective Ringer. I believe in dealing with Detective Ringer, it's probably legitimate cynicism from his years of police work. It's a 'difficult job. A lot of people that he deals with aren't going to tell the truth for various reasons. In his mind just because he believes that they're lying doesn't mean they're lying.
>
> Appendix G, p. 1833.

The Court should dismiss the petition as to the prosecutorial error ground. The defendant has attempted a second appeal on an issue that could have been included in his direct appeal if his appellate counsel deemed it meritorious or strategically to his advantage. Moreover reviewing the prosecutor's argument in context and in whole shows that there was good reason for the paucity of trial objections; the argument was not improper.

e. The defendant's trial counsel's performance was not challenged as ineffective in his direct appeal but could have been and thus is not properly subject to collateral attack, and furthermore the defendant has not sustained his collateral attack burden of proof as to this issue.

This ground for relief, like those above, could have been raised in the defendant's direct appeal but was not. Like his prior grounds, it constitutes an improper attempt at a second appeal under ***Gentry, Taylor*** and the authorities discussed above. For this reason alone, this petition should be dismissed as to this ground for relief as an attempt at an improper second appeal.

If the Court elects to review the merits, the defendant faces a steep climb. To prevail on an ineffective assistance claim a defendant must show both deficient performance and resulting prejudice. ***State v. Carson***, 179 Wn. App.961, 975, 320 P.3d

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185 (2014), citing ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The standard of review is *de novo*, "beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions." ***State v. Carson***, *supra* at 975-76, citing ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and ***State v. Grier***, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); ***State v. Hamilton***, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To rebut the adequate performance presumption, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance". ***State v. Grier***, 171 Wn.2d at 33, quoting ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

In this case the defendants arguments concerning ineffective assistance of trial counsel are simply reformulations of the substantive arguments addressed above. Without repeating the authorities and arguments presented above, it can be said that if the defendant has not sustained his burden concerning the merits of the alleged substantive errors, he also has not sustained his burden concerning his trial attorney's performance.

It bears repeating that the petitioner must show (1) actual and substantial prejudice resulting from alleged constitutional errors, or, (2) a fundamental defect that inherently results in a miscarriage of justice in case of alleged non-constitutional error. ***Matter of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Furthermore the defendant must prove any particular error by a preponderance of the evidence. *Id.*, citing ***In Re: Hews***, 99 Wn.2d 80, 89, 660 P.2d 263 (1983). ***In re Personal Restraint of Borrero***, 161 Wn. 2d 532, 536, 167 P. 3d 1106 (2007). The defendant's petition fails to meet these standards.

The lack of merit in the ineffective assistance argument can be clearly seen in relation to the defendant's argument concerning prosecutorial error. His primary complaint is as to the word truth. Petition, Exhibit 1, pp. 14-18. While it may be true that

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the prosecutor uttered the word truth or some derivative of it, it is not accurate to say that he made an improper argument. The prosecutor tailored his arguments to the instructions and the evidence, as in the examples discussed above. It is not an improper argument for a prosecutor to say, "So in this to convict, it says, under No. 1, on the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman. You have to find the truth of that beyond a reasonable doubt. If in any one of these elements, you can't come to a truth that was proved, then it's not guilty." Appendix G, p.1796.

Review of the other alleged trial errors fares no better. For example the accomplice instruction argument alleges that instructions given by the trial court were erroneous. However they are wholly consistent with the ***Roberts*** case and the knowledge statute, the defendant offers no proof of error. *See* ***State v. Roberts***, 142 Wn. 2d 471, 513, 14 P.3d 713 (2000) ("We adhere to the rule of ***Davis*** and ***Rice****:* an accomplice need not have knowledge of each element of the principal's crime in order to be convicted under RCW 9A.08.020. General knowledge of "the crime" is sufficient.") citing ***State v. Rice,*** 102 Wn.2d 120, 683 P. 2d 199 (1984), and ***State v. Davis,*** 101 Wn.2d 654, 682 P.2d 883 (1984). The knowledge and complicity instruction correctly stated that the prosecution bore the burden of proof beyond a reasonable doubt of showing that the defendant had actual knowledge of the crime. Considering that he was in a vehicle engaged in a rolling gang-motivated gun battle, it is not difficult to discern why the jury found the evidence sufficient to sustain the prosecution's burden.

Insofar as ineffective assistance of trial counsel is concerned, the defendant could have raised the issue in his direct appeal but didn't. It is a reasonable inference that his appellate lawyer did not raise the issue because the argument lacked merit. Furthermore even if the Court reaches the merits, the petition should be dismissed on this ground for

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failure to satisfy the demanding ineffective assistance standard not to mention the defendant's burden of production and proof.

B. THIS PETITION SHOULD BE DISMISSED AS TO THE INEFFECTIVE APPELLATE ASSISTANCE AND THE CUMULATIVE ERROR GROUNDS WHERE THE DEFENDANT HAS NOT SUSTAINED HIS BURDEN OF PROOF AND HAS SIMPLY REFORMULATED HIS SUBSTANTIVE ARGUMENTS.

As to the last two grounds asserted, the petition should be dismissed. Like the ineffective assistance of trial counsel arguments, the defendant has done nothing more than repackage his substantive arguments.

For obvious reason, the defendant did not allege ineffective assistance of appellate counsel in his direct appeal. Had he done so, his task would have been formidable. "Failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance . . . Rather, the exercise of independent judgment in deciding which issues may be the basis of a successful appeal is at the heart of the attorney's role in our legal process." ***Matter of Pers. Restraint of Lord***, 123 Wn. 2d 296, 314, 868 P.2d 835 (1994), citing ***Smith v. Murray***, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986), and ***Jones v. Barnes***, 463 U.S. 745, 751–54, 103 S. Ct. 3308, 3312–14, 77 L. Ed. 2d 987 (1983). Thus, in order to prevail on an appellate ineffectiveness claim, a defendant must show not only "the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly" as well as "demonstrate actual prejudice." *Id.*, citing ***Kimmelman v. Morrison***, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The merits of the defendant's substantive arguments have been addressed above and need not be repeated here. It goes without saying that his petition should be dismissed as to the ineffective appellate assistance ground because his substantive arguments are not valid. Furthermore, because the defendant did not actually discuss or critique his counsel's

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actual appellate strategy, there has been no showing that appellate counsel's strategy and approach was misguided. Under the ***Strickland*** standard it can hardly be said that the defendant has satisfied his burden of proof. ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). The most that can be said is that the defendant has reformulated his substantive arguments contrary to ***Lord.***

The cumulative error argument suffers from a similar defect, namely insufficiency. Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to have committed multiple, separate harmless errors. ***State v. Venegas***, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In such cases, each individual error might be deemed harmless whereas the combined effect could be said to infringe the right to a fair trial. *Id.* citing ***State v. Weber***, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), and ***State v. Hodges***, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *Id.*

The defendant's cumulative error argument consisted of a single paragraph and no analysis. As such, it does not satisfy the defendant's demanding collateral attack burden of production or proof. As to ground number eight, the Court should dismiss this petition.

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D. CONCLUSION:

For the foregoing reasons, the State urges the Court to dismiss the defendant's petition.

DATED: June 16, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB #17298

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-17-16 Meren Kar
Date Signature

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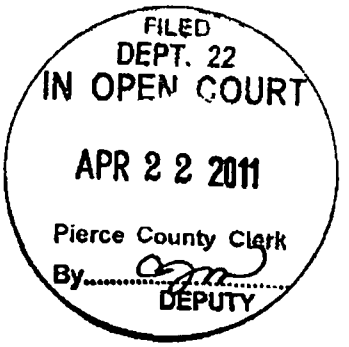
APPENDIX "A"



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEVIN WAYNE FRANKLIN, Defendant.	CAUSE NO. 09-1-02724-4 APR 2 2 2011 WARRANT OF COMMITMENT 1) ☐ County Jail 2) ☒ Dept. of Corrections 3) ☐ Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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[ ] 3 YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above)

Dated: 4/22/11

By direction of the Honorable

JOHN R. HICKMAN
JUDGE

KEVIN STOCK
CLERK

By: Melissa Englen
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date APR 22 By: Melissa Englen

FILED
DEPT. 22
IN OPEN COURT
APR 22 2011
Pierce County Clerk
By: DEPUTY

STATE OF WASHINGTON
ss.
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____

KEVIN STOCK, Clerk
By: _____ Deputy

ajc

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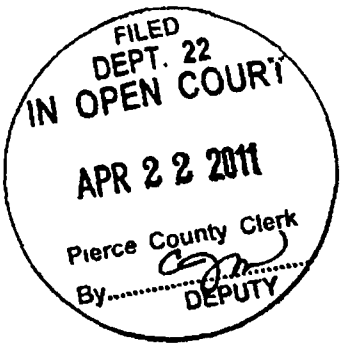
Telephone: (253) 798-7400

09-1-02724-4



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

APR 22 2011

STATE OF WASHINGTON,

Plaintiff,

vs.

KEVIN WAYNE FRANKLIN

Defendant

SID. WA21158179
DOB: 03/07/88

CAUSE NO. 09-1-02724-4

JUDGMENT AND SENTENCE (FJS)
[X] Prison [ ] RCW 9.94A.712 Prison Confinement
[ ] Jail One Year or Less
[ ] First-Time Offender
[ ] Special Sexual Offender Sentencing Alternative
[ ] Special Drug Offender Sentencing Alternative
[ ] Breaking The Cycle (BTC)
[ ] Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
[ ]Juvenile Decline [ ]Mandatory [ ]Discretionary

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS: 4/22/11

2.1 CURRENT OFFENSE(S): The defendant was found guilty on by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO
I	DRIVE-BY SHOOTING (E14A)	9A.36.045(1)	GANG AGG	05/31/09	091510139 TACOMA PD
II	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (GGG66)	9.41.040(1)(a)	GANG AGG	05/31/09	091510139 TACOMA PD
III	ASSAULT IN THE FIRST DEGREE (E23)	9A.36.011(1)(a)	FASE + CO GANG AGG	05/31/09	091510139 TACOMA PD

11-9-04684-3

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* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61 520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8) (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Jury Verdict Information

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589).

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number).

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ROB 1	07/12/04	KITSAP CO	05/24/04	A	V

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA.

COUNT NO	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	5	VII	41-54 MOS	GANG AGG	41-54 MOS	10 YRS $20,000
II	3	VII	31-54 MOS	GANG AGG	31-54 MOS	10 YRS $20,000
III	5	XII	138-184 MOS	FASE + CO GANG AGG 60 MOS	198-244 MOS	LIFE $50,000

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within [ ] below the standard range for Count(s) _____

[ ] above the standard range for Count(s) _____.

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

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2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS** The court has considered the total amount owing, the defend's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9 94A 753

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9 94A.753):

_____

[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate

_____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1

3.2 [ ] The court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts

_____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN $_____ Restitution to: _____

$_____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV $ 500.00 Crime Victim assessment

DNA $ 100.00 DNA Database Fee

PUB $ 400.00 Court-Appointed Attorney Fees and Defense Costs

FRC $ 200.00 Criminal Filing Fee

FCM $_____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

$_____ Other Costs for: _____

$_____ Other Costs for: _____

$ 1,200.00 TOTAL

[ ] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

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[ ] shall be set by the prosecutor.

[X] is scheduled for 5/27/11.

[ ] RESTITUTION Order Attached

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein. Not less than $ per CCO per month commencing. per CCO RCW 9.94 760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[ ] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse ________________ (name of electronic monitoring agency) at ______________________________, for the cost of pretrial electronic monitoring in the amount of $________________.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43 43 754

[ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT

The defendant shall not have contact with Lisa Vickers 09/15/01 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 5 years (not to exceed the maximum statutory sentence)

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER. Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law

· Follow conditions per DOC/CCO
Law abiding conditions
Forfeit all property in evidence

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4.4a **BOND IS HEREBY EXONERATED**

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

54	months on Count	I		months on Count	
54	months on Count	II		months on Count	
200	months on Count	III		months on Count	

[~~140~~ w/ 60 mos flat FASE]

Actual number of months of total confinement ordered is: 200 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[ ] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Count III, 140 months to be served consecutively to 60 months FASE.

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 547

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4.6 [ ] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[ ] **COMMUNITY CUSTODY** (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2), or

(2) the period imposed by the court, as follows:

Count(s) III 36 months for Serious Violent Offenses

Count(s) I 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed, (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody, (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall:

[ ] consume no alcohol

[ ] have no contact with: _____

[ ] remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

_____

[ ] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[ ] participate in the following crime-related treatment or counseling services: _____

_____

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse

[ ] mental health [ ] anger management and fully comply with all recommended treatment.

[X] comply with the following crime-related prohibitions. Per DOC/CCO

_____

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[ ] Other conditions:

_____

_____

_____

[ ] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED, That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

_____

_____

_____

_____

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: C76F3FD6-73A1-4A16-8FD1CAED966B01D8
Certified By: Kevin Stock Pierce County Clerk, Washington

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10 73.090.

5.2 **LENGTH OF SUPERVISION** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9 94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9 94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

Defendant waives any right to be present at any restitution hearing (sign initials): V.F.

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means RCW 9.94A.634.

5 6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9 41 040, 9.41 047

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION** RCW 9A.44 130, 10 01 200

N/A

5.8 [ ] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46 20.285

5 9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

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5.10 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 4/22/11

JUDGE
Print name: John R. Hickman

Deputy Prosecuting Attorney
Print name:
WSB #

Attorney for Defendant
Print name:
WSB # 13218

Defendant
Print name:

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066, c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature:

FILED
DEPT. 22
IN OPEN COURT
APR 22 2011
Pierce County Clerk
By _____ DEPUTY

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone (253) 798-7400

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 09-1-02724-4

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Emily Dirton

Court Reporter

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: C76F3FD6-73A1-4A16-8FD1CAED966B01D8
Certified By: Kevin Stock Pierce County Clerk, Washington

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

____ sex offense
X serious violent offense
____ assault in the second degree
____ any crime where the defendant or an accomplice was armed with a deadly weapon
____ any felony under 69 50 and 69 52

The offender shall report to and be available for contact with the assigned community corrections officer as directed;

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

____(I) The offender shall remain within, or outside of, a specified geographical boundary; _____

_____

____(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals. _____

_____

____(III) The offender shall participate in crime-related treatment or counseling services;

____(IV) The offender shall not consume alcohol, _____

____(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

____(VI) The offender shall comply with any crime-related prohibitions.

X (VII) Other: per DOC/CCO

_____

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

IDENTIFICATION OF DEFENDANT

SID No WA21158179 (If no SID take fingerprint card for State Patrol)

Date of Birth 03/07/88

FBI No. 56943XBO

Local ID No. UNKNOWN

PCN No. 539808770

Other

Alias name, SSN, DOB _____

Race:						Ethnicity:		Sex:	
[ ]	Asian/Pacific Islander	[X]	Black/African-American	[ ]	Caucasian	[ ]	Hispanic	[X]	Male
[ ]	Native American	[ ]	Other :			[X]	Non-Hispanic	[ ]	Female

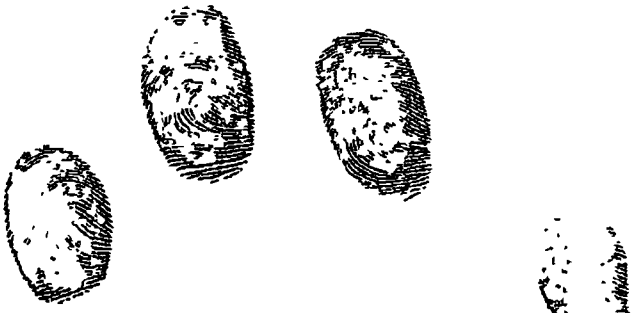
FINGERPRINTS

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, _____ Dated. _____

DEFENDANT'S SIGNATURE _____

DEFENDANT'S ADDRESS: _____

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: C76F3FD6-73A1-4A16-8FD1CAED966B01D8
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 15 day of June, 2016

Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Jun 15, 2016 3:18 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: C76F3FD6-73A1-4A16-8FD1CAED966B01D8**.
This document contains 14 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "B"

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEVIN FRANKLIN, Defendant.	CAUSE NO. 09-1-02724-4 DECLARATION FOR DETERMINATION OF PROBABLE CAUSE

EDMUND M. MURPHY, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the TACOMA POLICE DEPARTMENT, incident number 091510139 and have been briefed by Tacoma Police Detectives Vold and Nist;

That the police report and/or investigation provided me the following information;

That in Pierce County, Washington, on or about the 31st day of May, 2009, the defendants, JEROME RAY KENNEDY, CONRAD IVORY EVANS, KEVIN FRANKLIN and DESMOND RAY JOHNSON, did commit the crime of Drive-By Shooting, and defendants KENNEDY, FRANKLIN and JOHNSON did commit the crime of Unlawful Possession of a Firearm in the First Degree.

At approximately 2:00 a.m. Benjamin Grossman was stopped in the 5400 block of South Cedar Street, facing southbound at the curb in the northbound lane. He observed a sub-compact vehicle turn northbound onto South Cedar Street from South 56th Street at a very high rate of speed. The sub-compact was being followed by a white Ford Explorer. As the Explorer made the turn, Grossman observed occupants of the Explorer firing guns at the other vehicle. Some of the rounds struck Grossman's vehicle, and he ducked down in his seat for cover. At South 54th Street, the sub-compact turned eastbound and the Explorer turned westbound. A physical check of Grossman's vehicle revealed a bullet strike to the right passenger door that penetrated the door, with the bullet ending up on the passenger seat. A second strike was located in the rear quarter panel at the top edge of the truck bed and a third strike was to the right rear tire. A friend of Grossman was also parked on the same street and observed that the two passenger door windows were down on the Explorer and that it appeared to him that muzzle flashes were coming out of both windows. A police officer in the area heard the shots and responded immediately. He got a suspect description of the vehicles involved. A total of eight .40 caliber shell casings were located along the east side of South Cedar Street, and it was also determined that a nearby motor home was also struck by a bullet.

Within approximately 4-5 minutes, Tacoma Police offices observed a white Ford Explorer traveling at a high rate of speed turning eastbound onto South 74th Street from Tacoma Mall Boulevard. The vehicle pulled into the Chevron station located at South 72nd and Hosmer Streets and officers observed four males exit the vehicle. A review of the surveillance tape from the Chevron station showed that defendant EVANS got out of the driver's door, defendant KENNEDY got out of the front passenger side door, defendant FRANKLIN got out of the rear driver's side door, and defendant JOHNSON got out of the rear passenger side door. Defendants KENNEDY and FRANKLIN went to a nearby Olds Cutlass and got in, with defendant KENNEDY getting into the front passenger seat and defendant FRANKLIN getting into the rear passenger side. A silver and black Taurus .40 caliber semi-automatic handgun was later recovered by the police from under the front passenger seat of the Cutlass.

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Main Office (253) 798-7400

Officers observed defendants EVANS and JOHNSON enter the store located at the Chevron station. Before entering the store, defendant JOHNSON was seen putting an item into a garbage can outside the store. A later search of that garbage can revealed one loose .38 caliber shell casing in the can and four additional .38 caliber shell casings inside a paper bag in the can. Surveillance video from inside the store showed defendant JOHNSON bending over at a location where a revolver was subsequently located by the police. Defendant JOHNSON was then observed placing something in a shelf at the exact area where a holster and a bag containing bullets were later located by police. A glove was also recovered in the store in a display area. A matching glove was found in the Explorer. Defendants EVANS and JOHNSON exited the store and were taken into custody. Defendants KENNEDY and FRANKLIN were taken into custody at the Olds Cutlass.

Grossman's friend was brought to the scene of the arrests and positively identified the white Explorer as being the vehicle from which he observed the shots being fired.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: June 1, 2009
PLACE: TACOMA, WA

/s/ EDMUND M. MURPHY
EDMUND M. MURPHY, WSB# 14754

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: DE8AA818-39B0-4A9A-9A5C7706E9CBD91E
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 15 day of June, 2016

Kevin Stock, Pierce County Clerk

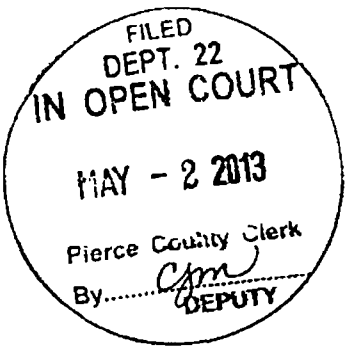
By /S/Linda Fowler, Deputy.
Dated: Jun 15, 2016 3:18 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: DE8AA818-39B0-4A9A-9A5C7706E9CBD91E**.
This document contains 2 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "C"

09-1-02724-4 40458509 CPRM 05-02-13



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs FRANKLIN, KEVIN WAYNE, Defendant	Cause No. 09-1-02724-4 COURT OF APPEALS DIVISION II UNPUBLISHED OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DESMOND RAY JOHNSON, Appellant,	No 42027-9-II (Consolidated with)
STATE OF WASHINGTON, Respondent, v. KEVIN WAYNE FRANKLIN, Appellant	No. 42031-7-II UNPUBLISHED OPINION

HUNT, J. — Desmond Ray Johnson and Kevin Wayne Franklin appeal their jury trial convictions for drive-by shooting, first degree unlawful possession of a firearm, and first degree assault; Franklin also appeals his gang-enhanced standard-range sentences. Both Johnson and Franklin argue that the trial court violated their right to a fair trial by erroneously admitting gang affiliation evidence to prove motive and intent under ER 404(b) and to prove the res gestae of the crimes. Johnson separately argues that the State's gang expert gave improper opinion testimony. Franklin separately argues that insufficient evidence supported his convictions and gang sentencing enhancements. We hold that the trial court did not abuse its discretion in admitting the challenged evidence, that sufficient evidence supports Franklin's convictions and sentencing

enhancements, and that Johnson failed to preserve his expert opinion testimony challenge. We affirm both defendants' convictions and Franklin's gang-enhanced sentences.

FACTS

I. Drive-by Shooting, Assault, and Unlawful Possession Charges

Defendant Kevin Wayne Franklin was a member of the Eastside Gangster Crips in Bremerton; he considered fellow Tacoma Eastside Gangster Crips gang member Jerome Kennedy an "associate." 13 Verbatim Report of Proceedings (VRP) at 1624. The Tacoma Young Gangster Crips was a rival of Tacoma's Eastside Gangster Crips and Tacoma's Hilltop Crips.

In late May 2009, Hilltop Crips gang member Curtis Hudson was at a Tacoma 7-Eleven store with Kennedy (his brother) and his friend Kyle Ragland when a large fight broke out between these rival sets of the Crips gang. Hudson and John Morris of the Young Gangster Crips began pushing each other; Kennedy intervened and punched Morris. During the fight, Kennedy's gold necklace was stolen; eventually it came into Morris's possession

The following week, Kennedy and Morris "had problems" with each other. 9 VRP at 929. Kennedy attempted to reclaim his gold necklace several times, but Morris made it clear that Kennedy would either have "to pay" or "to fight" Morris for it. 12 VRP at 1451.

About a week after the 7-Eleven fight, on the evening of May 30, Kennedy called Franklin "to go out"; Franklin agreed. 13 VRP at 1635. Kennedy and Conrad Evans, who was also known to "hang[ ] out" with the Eastside Gangster Crips, picked up Franklin in Evans' girlfriend's white Ford Explorer. 9 VRP at 925. Franklin sat in the driver's side backseat behind Evans; Kennedy was sitting in the front passenger seat. They picked up Desmond Johnson,

another of Franklin's "associate[s]" affiliated with the Eastside Gangster Crips, who sat in the back passenger seat next to Franklin. 13 VRP at 1623. Although both Franklin and Johnson were affiliated with the Eastside Gangster Crips, neither Franklin nor Johnson had been involved in the 7-Eleven fight.[1]

Evans, Kennedy, Franklin, and Johnson went to The Friendly Duck bar; they arrived around 12:45 AM and had a few drinks. While they were drinking, Kennedy received a phone call from Ragland, who was three blocks away at the 54th Street Bar and Grill with Hudson and Marcus Jenkins. According to Kennedy, Ragland's car was blocked in at the 54th Street Bar and Grill, and Ragland believed that someone in the car in front of him had taken a pistol from that car's trunk. Jenkins had seen Morris at the 54th Street Bar and Grill and knew that he was having "problems" with Hudson and Kennedy; Hudson also knew Morris was present. 9 VRP at 970. When Ragland and Kennedy hung up, Hudson understood that Kennedy would soon be at the 54th Street Bar and Grill.

Between 1:32 AM and 1:39 AM, Franklin texted his girlfriend that he was "handlin business." 11 VRP at 1320.[2] When she inquired what kind of "business" would keep him out at 2:00 AM, Franklin texted her: "Stop askin questions and use your head and you will know what I am on. *I jus got jacc't and now it's time to give some*[*one*] *the blues*." 11 VRP at 1320 (emphasis added).

[1] The record reflects that only Kennedy had been involved in the 7-Eleven fight.

[2] We are quoting verbatim text messages sent through cellphones. We have not attempted to correct this quoted language.

Less than a minute later, The Friendly Duck's surveillance cameras caught Evans, Kennedy, Franklin, and Johnson getting back into the white Ford Explorer in the same configuration as before—i.e , with Evans driving, Kennedy in the front passenger seat, Franklin in the backseat on the driver's side, and Johnson in the backseat on the passenger's side. They drove to the 54th Street Bar and Grill and circled the parking lot a few times. Eventually, Hudson walked up to the Ford Explorer and appeared to speak with the occupants inside; the Ford Explorer then pulled around to the back alley.

At 2:03 AM, when people were leaving the 54th Street Bar and Grill, the white Ford Explorer (with Evans, Kennedy, Franklin, and Johnson inside) was parked in the back alley behind Ragland's car (with Ragland, Hudson, and Jenkins inside), which was behind Morris's green car, in the front of this line. As they were leaving, Kennedy phoned Hudson in Ragland's middle car to let Hudson know that he (Kennedy) was in the white Ford Explorer, behind Ragland's car. As they pulled out of the alley, Hudson received another call and was told to "turn off." 9 VRP at 965. At the next intersection, Morris's car turned left onto Cedar Street, Ragland's car turned right, and the Ford Explorer then turned left, following Morris's car onto Cedar Street. Guns from the passenger side of the Ford Explorer fired on Morris's car.[3] Apparently, no one in Morris's car was injured.[4]

[3] Kennedy later claimed that he had fired "two guns" (a .38 and .40 caliber) simultaneously from the Explorer's front passenger seat. The police suspected, however, that another occupant in the car had been the second shooter. 10 VRP at 1152.

[4] After fleeing the scene, Morris's car caught up with Ragland's car on Oakes Street and opened fire on it in a separate drive-by shooting; Ragland was killed, and Jenkins was shot in the back. Franklin and Johnson were not charged with any crime in connection with this second drive-by shooting. Nor do they challenge on appeal the trial court's admission of this evidence.

Three independent eye witnesses observed the drive-by shooting on Cedar Street. Shortly after 2:00 AM, Jeremy Berntzen had just exited a vehicle in his friend's Cedar Street driveway when he saw a white Ford Explorer with a "dark gray" "bottom" driving fast and shooting at a dark-colored car; he heard seven to nine gunshots, fired in rapid succession. 5 VRP at 205. Berntzen observed a person shooting from the Explorer's rear passenger-side window, but he could not identify any facial features.

Benjamin Grossman, who had been trailing Berntzen in his truck, was still seated in his vehicle when he saw a small sedan followed by a Ford Explorer turn quickly onto Cedar Street; he heard seven gunshots and saw "sparks" coming from the Explorer's rear passenger-side window. 6 VRP at 253. The Explorer and the other vehicle sped off in opposite directions. Three bullets struck Grossman's truck, hitting his passenger-side door and tire.

Darlene Esqueda heard gunshots while watching television in her home near Cedar Street. When she looked out her window, she saw a white SUV driving quickly, chasing a dark-colored car, with a person with a gun sticking his arm outside of the SUV's passenger-side window. Several other neighbors also heard gunshots and called the police. Within a minute, Officer Christopher Martin responded and confirmed that none of the bystanders were injured. Berntzen reported having seen "two" shooters on the Ford Explorer's passenger-side (one in front and one in back); and he provided a description of the vehicle, which Martin broadcast on the police radio. 6 VRP at 383.

Officer Nicholas Jensen was responding to the Cedar Street shooting within minutes of Martin's broadcast of the vehicle's description when he saw a white Ford Explorer speed past him, with "debris" (brush, grass, etc.) hanging from its undercarriage, and turn into a Chevron

gas station. 7 VRP at 495. Jensen pulled around the Chevron station, called for backup, and watched four men exit the Ford Explorer and approach a tannish-brown Cutlass parked at a gas pump.

After pulling into the Chevron station, Franklin immediately exited the Ford Explorer's rear driver-side seat, got into the Cutlass, and sat in its rear passenger-side seat; Kennedy exited the Explorer's front passenger seat, also got into the Cutlass, and sat in its front passenger seat. Evans exited the Explorer's driver's seat, spoke with the Cutlass's owner, and then entered the Chevron station. Inside the Chevron station, Evans called his girlfriend and told her to report the Explorer stolen. Johnson exited the Explorer on the rear passenger-side, threw a Burger King bag into the Chevron's garbage can, entered the Chevron station, and then appeared to place something on one of Chevron station's shelves These actions were all recorded on the Chevron's surveillance video.

After backup arrived, police officers approached the Cutlass's owner and the four men from the Ford Explorer, handcuffed them, read them their *Miranda*[5] rights, placed them in patrol vehicles, and confiscated their cell phones. Franklin's and Johnson's cell phones contained photographs and/or monikers associated with the Tacoma Eastside Gangster Crips Kennedy and Franklin had "neatly-folded" blue bandannas, emblems commonly associated with the Crips gang. 11 VRP at 1388.

During a protective sweep of the Ford Explorer and the Cutlass at the Chevron station, the officers discovered a .40 caliber handgun under the Cutlass's front passenger seat, where Kennedy had previously been seated; they found no weapons in the Ford Explorer. The officers

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

found four .38 caliber shell casings inside the Burger King bag that Johnson had thrown into the Chevron's garbage. On the Chevron station's shelves, they found a .38 caliber handgun, a holster, a black glove, and a black nylon bag with five unused .38 caliber bullets.

Police officers at the scene of the Cedar Street shooting found eight .40 caliber shell casings, which forensics testing later revealed had been fired from the same .40 caliber handgun discovered under the Cutlass's front passenger seat at the Chevron station. These officers also recovered two bullet fragments from Grossman's passenger-side seat and tire. And they found two fired .38 caliber bullets, which matched the shell casings from the discarded Burger King bag and had been fired from the same .38 caliber handgun found inside the Chevron station. The officers later took Berntzen to the Chevron station, where he identified the Ford Explorer as the one that had been involved in the drive-by shooting.

II. PROCEDURE

The State charged Franklin and Johnson with drive-by shooting, first degree assault, second degree assault, and first degree unlawful possession of a firearm.[6] The State also sought sentencing enhancements (1) for the two assault charges, based on Franklin's and Johnson's having committed these crimes while armed with a firearm; and (2) for all counts, based on Franklin's and Johnson's having committed these crimes with intent to benefit a criminal street gang, in violation of RCW 9.94A.535(3)(aa).

[6] The State also charged Kennedy and Evans with these crimes. They pleaded guilty before trial.

A. Pretrial Motions

Franklin and Johnson moved in limine to prohibit the State from introducing ER 404(b) gang affiliation evidence and the 7-Eleven fight, in which neither had participated. The State argued that evidence of the earlier 7-Eleven fight and Franklin's and Johnson's gang affiliations were admissible under ER 404(b) as "res gestae" of the charged offenses and to show Franklin's and Johnson's motive and intent in committing the charged crimes. Clerk's Papers (CP) at 344. The trial court ruled that "limited testimony" about the 7-Eleven fight was admissible as "res gestae" of the charged offenses (because it was "part of the story"), conditioned on giving a limiting jury instruction that Franklin and Johnson had not been present during the 7-Eleven fight. 5 VRP at 163.

The trial court also ruled that (1) Franklin's, Johnson's, and the other participants' gang monikers were admissible to show their "identit[ies]" because they referred to each other by these nicknames and sometimes did not know each others' birth names; (2) their gang status and rivalries were admissible to show "motive"; and (3) Detective John Ringer could testify as a gang expert to explain gang culture and specific gang-related evidence (bandannas, tattoos, monikers, etc.) once the State established his qualifications. 5 VRP at 170. The trial court required a limiting instruction that Johnson did not have an identifiable gang moniker associated with him; and the trial court stated that it would give additional limiting instructions about Johnson's "knowledge or [gang] affiliation," depending on what the evidence showed at trial. 5 VRP at 181.

B. Trial

1. State's evidence

The State's witnesses testified about the previously described facts. In addition, Evans testified that shots had been fired from only the front passenger seat but that he did not know who had been the shooter. Kennedy testified that he alone had shot at Morris's car by firing the .38 and .40 caliber handguns simultaneously from the Ford Explorer's front passenger seat, "[p]retty much because of [the 7-Eleven] altercation" that he had had with Morris a week earlier. 10 VRP at 1129. Kennedy admitted being associated with the Tacoma Eastside Gangster Crips, having gang tattoos and a blue bandana on him the night of the shooting, and placing the .40 caliber handgun under the seat of the Cutlass at the Chevron station.

Detective Ringer testified as an expert about gang culture, gang status and rivalries, and the gang evidence recovered in the case as follows: The Tacoma Eastside Gangster Crips (to which Kennedy belonged) and the Tacoma Young Gangster Crips (to which Morris belonged) are different "sets" of the Crips gang; Crips sets often "battle for supremacy," "respect," and "territory." 12 VRP at 1437, 1438. Because gangs like the Eastside Gangster Crips do not have a formal hierarchy, a gang member or associate can achieve status within the gang by having "connections" with drug dealers or by doing "drive-by shootings" and demonstrating his ability to keep rival gang members at bay. 12 VRP at 1465. Both a gang's and an individual gang member's "reputation" and "street credibility" are important; neither wants to be perceived as "weak." 12 VRP at 1483, 1484. If a gang member like Kennedy feels "disrespected" by a rival gang, "the very nature of the gang demands that [he] strike back" and "prove [his] worth." 12 VRP at 1487. If a fellow gang member or associate is asked to "step up" to help retaliate and he

does not assist, he will be considered "weak" and will eventually be "checked" by members of his own gang. 12 VRP at 1487, 1488. In Ringer's experience, it is not uncommon for gang members and associates to respond to a showing of disrespect with disproportionate levels of violence.

Ringer also discussed the physical evidence in the case. He testified that (1) the neatly-folded blue bandannas that police found on Kennedy and Franklin are commonly worn or displayed by Crips gang members as "flag[s]";[7] (2) gang members often use the term "associate" to refer to a person who "hang[s]" out with their gang but who is not yet a formal member; (3) gang members use monikers or nicknames to refer to each other; and (4) they usually also have several tattoos that display their gang affiliations. 12 VRP at 1483. Ringer further testified that he believed Franklin was a member of the Eastside Gangster Crips based on his blue bandanna and his several gang tattoos, including the acronym "EGC,"[8] which stands for "East Side Gangster Crip," tattooed across his back. 12 VRP at 1495. Ringer also testified Johnson's cell phone was "loaded with monikers," which showed that he also associated with the same gang. 12 VRP at 1496.

Ringer described his interviews with Franklin and Kennedy after the shooting. Although both men had initially been evasive, the next day Kennedy contacted police to provide additional information about the shooting and to minimize his involvement; Ringer explained that this contact had caused him concern because gang members generally do not want to speak with the police.

[7] 11 VRP at 1389.

[8] 13 VRP at 1626.

The State then elicited the following testimony about gang members' general unwillingness to cooperate with law enforcement:

> [STATE:] In regard to this intimidation factor . . . were you concerned about the veracity, I guess, of a gang person, Mr. Kennedy, giving you truthful information?
> [RINGER:] Definitely.
> [STATE:] Is there in your experience an adverse effect to when a gang member talks, whether they're being truthful or not, to law enforcement?
> [RINGER:] *Almost 100 percent of the time, a . . . gang member, is not going to be totally honest with law enforcement* in an interview. . . . The whole culture of the gangs says you don't cooperate with the police. You certainly don't talk honestly with the police. You don't snitch. You don't tell on fellow gang members even if you're a victim. You tend—the gang culture says you don't talk with the police, you don't cooperate.
>
> *[W]hen we find a gang member who's willing to talk, we approach it very sort of apprehensively as far as whether he's going to tell the truth or not.* We take everything with a grain of salt. We work through the issues and try to get as much of the truth as possible, but we go in anticipating that they're not going to be truthful with us.

12 VRP at 1406-07 (emphasis added). Neither Franklin nor Johnson objected to this testimony or moved to strike Ringer's statements.

2. Defendants' evidence

Franklin testified in his own defense; Johnson did not. Franklin admitted (1) having served 24 months in prison for robbery;[9] (2) being "jumped into" the Eastside Gangster Crips; (3) having the gang moniker "Monster"; (4) having several gang tattoos; (5) having a blue bandanna on him the night of the shooting and that such bandannas are a "flag" of the Eastside Gangster Crips; and (6) sending his girlfriend a text message shortly before the shooting, which message stated that he had been "jacked" and that he was going to give somebody the "blues." 13 VRP at 1623, 1624, 1641. But he denied that his text message had anything to do with the

[9] Franklin testified that his prior conviction was merely for "[r]obbery," but his judgment and sentence show that it was for first degree robbery. 13 VRP at 1620.

shooting of Morris's car or the previous fight at the 7-Eleven, both of which he claimed he knew nothing about.[10]

Franklin similarly denied seeing any guns the night of the shooting. He claimed that he had been drinking heavily that night,[11] he had "passed out" in the Ford Explorer's backseat after arriving at the 54th Street Bar and Grill, and the next thing he remembered was waking up to the sound of "gunshots" and being "tossed around" in the Ford Explorer as it drove through a ditch. 13 VRP at 1644, 1645. In a written declaration, Kennedy corroborated this part of Franklin's testimony, stating that Franklin had been asleep at the time of the shooting.

C. Judgment and Sentence

The jury found both Johnson and Franklin guilty of drive-by shooting, first degree unlawful possession of a firearm, and first degree assault. The jury also returned special verdicts on Franklin's counts,[12] finding that he had committed all three crimes with intent to benefit a criminal street gang and that he had committed first degree assault while armed with a firearm.[13] The trial court imposed standard range sentences for Franklin's underlying convictions plus an additional 60 months for his firearm sentencing enhancement on the first degree assault charge,

[10] According to Franklin, his car had been broken into the night before the shooting, and items had been stolen from him. He asserted that his text messages about being "jacked" related to this earlier incident. 13 VRP at 1641.

[11] In contrast, Ringer testified there was no evidence of Franklin's having been intoxicated during their interview immediately after the May 31 incident.

[12] The jury did not reach a verdict about whether Johnson had committed first degree assault while armed with a firearm or whether he had committed the crimes for which he was convicted with the intent to benefit a criminal street gang.

[13] Franklin does not challenge this firearm sentencing enhancement on appeal.

resulting in a total of 200 months confinement, it does not appear that the trial court imposed additional time for Franklin's gang sentencing enhancements.[14] The trial court imposed low-end standard range sentences for Johnson's convictions, resulting in 138 months total confinement. Franklin and Johnson appeal their convictions; Franklin also appeals his gang-enhanced sentences.

ANALYSIS

I. EVIDENCE ADMISSIBILITY

Franklin and Johnson first argue that we should reverse their convictions because the trial court erroneously admitted the following prejudicial evidence as exceptions under ER 404(b): (1) the 7-Eleven fight, as "res gestae" of the charged crimes; and (2) gang affiliation, to establish their motive and intent for participating in the drive-by shooting. Br. of Appellant (Franklin) at 37; Br. of Appellant (Johnson) at 16. These arguments fail.

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Lormor*, 172 Wn.2d 85, 94, 257 P.3d 624 (2011); *State v. Yarbrough*, 151 Wn. App 66, 81, 210 P 3d 1029 (2009). A trial court abuses its discretion if its decision is manifestly unreasonably or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Such an abuse of discretion exists if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its

[14] The State asked the trial court to impose high-end standard-range sentences for Franklin rather than additional time for his gang aggravators. The trial court appears to have partially adopted the State's recommendation by imposing (1) high-end standard range sentences of 54 months for Franklin's drive-by shooting and unlawful possession of a firearm convictions; and (2) a low-end standard range sentence of 140 months for Franklin's first degree assault conviction, plus an additional 60 months for the firearm sentencing enhancement.

ruling on an erroneous view of the law. *Lord*, 161 Wn.2d at 284. We find no abuse of discretion here.

A. 7-Eleven Fight: ER 401, 402, and 403

Franklin and Johnson argue that the trial court's admission of the 7-Eleven fight was reversible error because (1) neither of them had participated in that fight, which, thus, did not constitute a prior "bad act" by *them* under ER 404(b); and (2) even if the 7-Eleven fight were a prior bad act for ER 404(b) purposes, it was not admissible as "res gestae" because the fight occurred a week before the drive-by shooting and, thus, was not part of the shooting's "'immediate time and place.'" Br. of Appellant (Franklin) at 38, 50-51 (quoting *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003)); Br. of Appellant (Johnson) at 16. That neither Franklin nor Johnson participated in the 7-Eleven fight between Kennedy and Morris is not dispositive; nor does the typical ER 404(b) "prior bad acts" analysis resolve the question before us.

Despite the parties' ER 404(b)-based arguments, we follow our recent "res gestae" evidentiary analysis in *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012), and hold that the trial court did not abuse its discretion in admitting evidence of the 7-Eleven fight. As we also noted in *Grier*, Washington courts have traditionally stated that evidence of other crimes, wrongs, or acts is admissible under ER 404(b)'s "'res gestae'" or "'"same transaction' exception'" if the evidence is "admitt[ed] to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." *Grier*, 168 Wn App. at 645 (quoting *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997)); *State v. Lillard*, 122 Wn. App. 422,

432, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005). Although cases applying this rationale have purported to analyze "res gestae" evidence as an ER 404(b) "exception," we departed from this practice in *Grier*; instead, we analyzed such "res gestae" evidence under ER 401, 402, and 403, focusing on its relevance to the particular case before us and on whether the danger of unfair prejudice outweighed its probative value. *Grier*, 168 Wn. App. at 644. We recognized that, rather than being an ER 404(b) exception, "'res gestae' evidence more appropriately falls within ER 401's definition of 'relevant' evidence, which is generally admissible under ER 402," as long as the evidence also passes ER 403's prejudice versus probative value test. *Grier*, 168 Wn. App at 646.

Following *Grier*,[15] we apply ER 401 and ER 402's relevancy tests and ER 403's prejudice test to determine whether the trial court here abused its discretion in admitting evidence of the 7-Eleven fight.[16] "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn 2d 612, 621, 41 P.3d 1189 (2002). Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "Evidence is relevant if a logical nexus exists

[15] In *Grier*, we recognized that although ER 404(b) provides a non-exhaustive list of "'other purposes'" for which trial courts may admit evidence of other crimes, wrongs, or acts, the judicially-created "'res gestae'" exception is unlike the exceptions expressly listed in ER 404(b) because it involves evidence pertaining to the *factual* context of the crime, not the defendant's mindset. *Grier*, 168 Wn. App. at 645-46 (quoting ER 404(b)). Thus, considering "res gestae" evidence under ER 404(b) contravenes the ejusdem generis doctrine of statutory construction; and, as we noted in *Grier*, analysis of such evidence is more appropriate under ER 401, 402, and 403. *Grier*, 168 Wn. App. at 646.

[16] Accordingly, we do not reach Franklin's and Johnson's first argument that the 7-Eleven fight did not constitute a "prior act" admissible under ER 404(b).

between the evidence and the fact to be established." *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). Nevertheless, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

Applying these evidentiary rules here, we conclude that the 7-Eleven fight evidence was relevant under ER 401 and had a logical nexus with the charged crimes because (1) it had precipitated the shooting of Morris's car a week later, at least in part; and (2) it tended to prove that Kennedy, and potentially the other Ford Explorer occupants, had a motive for shooting at Morris's car and that they had acted in concert (as either principals or accomplices) to carry out the charged crimes. Kennedy, one of the admitted principals in these crimes, had previously fought with Morris at the 7-Eleven, during which Kennedy's gold chain had been stolen and had later ended up in Morris's possession. During the week between the 7-Eleven fight and the drive-by shooting, Kennedy had been "having problems"[17] with Morris; Kennedy had attempted to reclaim his gold necklace several times, but Morris had made it clear that Kennedy would either have "to pay" or "to fight" Morris for it. 12 VRP at 1451.

The record contains no evidence placing Franklin and Johnson with Kennedy during his earlier 7-Eleven fight with Morris. Nevertheless, it was undisputed that a week later, when Kennedy went to resolve the missing gold chain issue with Morris, (1) Kennedy had asked Franklin "to go out"[18] with him; and (2) both Franklin and Johnson were with Kennedy in the Ford Explorer before, during, and after the drive-by shooting of Morris. Thus, the 7-Eleven fight

[17] 9 VRP at 929.

[18] 13 VRP at 1635.

was intertwined with and "'complete[d] the story of the crime[s] on trial by proving [their] immediate context of happenings near in time and place'"; and it "'depicted'" a "'complete picture . . . for the jury.'" *Grier*, 168 Wn. App. at 647 (first alteration in original) (internal quotation marks omitted) (quoting *State v Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995), and *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004), respectively).

Moreover, the danger of unfair prejudice did not outweigh this 7-Eleven fight's probative value under ER 403. Misconduct is often admissible when it is probative and material, such as when it completes the description of the crime charged and is so connected in time, place, and circumstance. *State v. Tharp*, 96 Wn.2d 591, 594-96, 637 P.2d 961 (1981). At trial, the State argued that Johnson and/or Franklin were potential accomplices to the crimes that Kennedy, the principal, had undisputedly perpetrated and which were in evidence. Kennedy testified that, on the night of the shooting, he intended to confront Morris because only one week before, at the 7-Eleven down the street, Morris had taken a chain necklace that belonged to Kennedy. Such quarrels between a victim and the person who instigated harming the victim are probative of the harming person's intent. *See State v Parr*, 93 Wn.2d 95, 102, 606 P.2d 263 (1980).

To prove that Franklin and/or Johnson were accomplices to Kennedy's crimes, the State needed to show that these defendants knowingly "promote[d]" or "facilitate[d]" the commission of the crimes (1) by soliciting, commanding, encouraging, or requesting another person to commit the crimes; or (2) by aiding or agreeing to aid another in the planning or committing of the crimes. RCW 9A.08.020(3)(a).[19] The State presented evidence that Franklin and Johnson

[19] The legislature amended RCW 9A.08.020 in 2011. LAWS OF 2011, ch. 336, § 351. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

knowingly promoted or facilitated Kennedy's criminal objective: On the night of the shooting, less than a minute before the four men left for the bar where Morris was known to be present, Franklin sent text messages to his girlfriend "Lady Monster" that he had "just got jacc't" and was "[h]andlin' business." 11 VRP at 1320. The car carrying Kennedy, Franklin, and Johnson circled the establishment a few times, parked in a back alley, and then waited and followed the car that Morris was in. Kennedy testified that things "escalated" and shots were fired at Morris's car from the Explorer in which Johnson and Franklin were passengers with him (Kennedy). 10 VRP at 1141. Johnson's and Franklin's accomplice liability for the drive-by shooting and assault charges stems from these events.

The fight at the 7-Eleven, where Morris "jacc't" Kennedy's chain, was close in time and place to the shooting and, thus, was integrally connected. 11 VRP at 1320. The 7-Eleven fight was also an inseparable part of the charged crimes, without which the jury would have been left with a fragmented story and no context for Franklin's and Johnson's accomplice liability. Furthermore, the probative value of the 7-Eleven fight outweighed any prejudice to the defendants because the trial testimony neither directly stated nor indirectly implied that Johnson and Franklin had been present at this fight between Kennedy and Morris. We hold, therefore, that the trial court did not abuse its discretion in admitting evidence of the 7-Eleven fight

B. Gang Evidence: ER 404(b)

Franklin and Johnson also argue that the trial court erroneously used ER 404(b) to admit other prejudicial evidence about their "gang associations" and "gang culture," namely their gang status and rivalries and Ringer's expert testimony on gang culture, thus denying them a fair trial. Br. of Appellant at 36 (Franklin); Br. of Appellant (Johnson) at 16. The State counters that this

gang evidence was admissible under ER 404(b) to show the defendants' collective motive and intent in committing the crimes charged. We agree with the State that the gang evidence was admissible to show motive.

"ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhaven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). As Franklin and Johnson correctly note, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or conformity with it; but it may be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident. ER 404(b). Before a trial court may admit such evidence of other crimes or misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) state on the record the purpose for which the evidence is being introduced, (3) determine whether the evidence is relevant to a material issue, and (4) balance the probative value of the evidence against the danger of unfair prejudice. *State v. Mee*, 168 Wn. App. 144, 154, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011 (2012).

Gang evidence falls within the scope of ER 404(b). *Yarbrough*, 151 Wn. App. at 81. Courts have "regularly admitted gang affiliation evidence to establish the motive for a crime," to prove a defendant's intent, or to show that several defendants were acting in concert. *State v. Scott*, 151 Wn. App. 520, 527, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010); *Yarbrough*, 151 Wn. App. at 81; *see also State v. Embry*, 171 Wn. App. 714, 732, 287 P.3d 648

(2012) (evidence of concerted action is basis for finding multiple individuals guilty for taking part in a single crime). But before a trial court may admit gang affiliation evidence, there must be a "nexus" between the charged crime and gang affiliation; this nexus makes the gang evidence relevant. *Embry*, 171 Wn. App. at 732 (citing *Scott*, 151 Wn. App. at 526). Such is the case here.

1. Nexus

In its offer of proof, the State asserted that it would present evidence that (1) Franklin, Johnson, and the other participants in the shooting were "gang members"[20] affiliated with the Eastside Gangster Crips; (2) a week before the shooting, Kennedy had been in a fight with rival gang member Morris, which resulted in Kennedy's gold necklace being stolen and its ending up in Morris's possession; (3) Morris's stealing Kennedy's chain was a showing of "disrespect"[21] in the gang community, which often prompted a "disproportionate response"[22] from the offended gang; (4) Kennedy's being disrespected by rival gang member Morris was the "triggering event" that motivated Kennedy, Evans, Franklin, and Johnson to retaliate with the drive-by shooting of Morris's car; and (5) circumstances surrounding the drive-by shooting suggested that the four men had "work[ed] together" to accomplish the crimes, such as Kennedy's phone calls with Hudson and Ragland at the 54th Street Bar and Grill and Franklin's texts to his girlfriend about being "jacc't" and giving someone "the blues." 5 VRP at 156, 161; 11 VRP at 1320.

[20] 1 VRP at 67.

[21] 1 VRP at 69.

[22] 5VRP at 177.

We have previously held that there was a sufficient nexus between gang affiliation and the defendants' alleged crimes where the State presented evidence that (1) the defendants' killings were a result of rival gang activity; (2) the victims had shown disrespect for the defendants and had intruded on their "drug . . . turf"; and (3) in gang culture, this disrespect and intrusion were grounds for retaliation and murder. *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995). Similarly here, the State asserted it would present evidence that the drive-by shooting was the result of rival gang member Morris's showing disrespect to Kennedy and to the Eastside Gangster Crips when he stole Kennedy's gold necklace and that, in gang culture, such disrespect was grounds for disproportionate retaliation.

At trial, gang-expert Ringer also testified that a gang member or associate can achieve status by doing "drive-by shootings" on a rival gang; and if such member or associate does not "step up" and help retaliate when asked, he will be perceived as "weak" and will be "checked" by members of his own gang. 12 VRP at 1464, 1487, 1488. This testimony connected Franklin's and Johnson's gang affiliations, as well as Kennedy's, to the charged crimes. We hold, therefore, that there was a sufficient nexus between Franklin's and Johnson's gang affiliations and the charged crimes.

2. ER 404(b) requirements

Under ER 404(b), the trial court must first find by a preponderance of the evidence that the misconduct occurred. *Embry*, 171 Wn. App. at 732. The State's offer of proof was that, in addition to using monikers associated with gang membership, (1) Franklin had the Eastside Gangster Crips acronym "EGC" tattooed in large letters on his back, (2) Kennedy had identified Johnson as an Eastside Gangster Crip, and (3) the police had found monikers and other

information in Johnson's cell phone linking him to that gang. 5 VRP at 171. Consistent with this offer of proof, Franklin testified that he had the acronym "EGC" tattooed on his back and that it stood for "East Side Gangster Crip." 13 VRP at 1626. Based on this evidence, the trial court properly found by a preponderance of the evidence that Franklin and Johnson were either gang members or gang associates and that the relevant misconduct had occurred.

Second, the trial court had to identify the purpose for which the gang evidence would be introduced. *Embry*, 171 Wn. App. at 732. Here, the trial court concluded that the evidence was admissible to show the defendants' collective motive for the charged crimes. Washington courts have held that defendants' gang affiliations were admissible under ER 404(b) to prove motive because it (1) was highly probative of the State's theory—that the defendants were gang members "who responded with violence" to showings of disrespect, and (2) "established that killing someone heightened a gang member's status." *Campbell*, 78 Wn. App. at 822; *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn 2d 1015 (1998). Here, the gang evidence was similarly admissible to show the motives of (1) Kennedy, who had personally been "disrespected" when Morris stole his gold chain; and (2) Franklin and Johnson, who were likely willing participants, motivated by a desire to increase their gang status and to avoid being perceived as weak. The trial court did not abuse its discretion in determining that motive was an admissible purpose for the gang evidence.

Third, the trial court had to determine that the evidence was relevant to a material issue. *Mee*, 168 Wn. App. at 154. Here, in addition to showing Franklin's and Johnson's motives, the gang evidence was relevant to a material issue because it tended to prove the intent element of Franklin's and Johnson's crimes and to prove Franklin's gang-aggravated sentencing

enhancement factors. Because the evidence showed that Kennedy and potentially only one other occupant in the four-occupant Ford Explorer had fired the guns at Morris's car, the trial court instructed the jury on accomplice liability. To prove that Franklin and Johnson were accomplices to the drive-by shooting of Morris's car and to the resulting assault on Grossman, the State needed to prove that Franklin and Johnson had "the criminal mens rea to aid or agree to aid the commission of a specific crime" and acted "with knowledge [that] the aid [would] further the crime." *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P 3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011). The aggravating sentencing factors accompanying each charged offense also required the State to prove that Franklin and Johnson "committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." RCW 9.94A.535(3)(aa).

Evidence of Franklin's and Johnson's gang affiliations, and Ringer's testimony about the role of "disrespect"[23] in gang culture and the ways that a gang member can achieve "status" within a gang (e.g., by doing drive-by shootings), helped establish their accomplice liability and the aggravating sentencing factors on all counts: This evidence tended to show that Franklin and Johnson had knowingly participated in the crimes—if not by shooting the second gun themselves, then by encouraging or aiding in the commission of the shooting by another. We hold that the trial court did not abuse its discretion in concluding that the gang evidence was relevant to a material issue in the case.

[23] 12 VRP at 1487.

Fourth, the trial court had to weigh the probative value of the gang affiliation evidence against its potential prejudicial effect. *Embry*, 171 Wn. App. at 732. As we have already noted in the preceding section of this analysis, the gang evidence was highly probative of the State's theory that Kennedy, Evans, Franklin, and Johnson had acted in concert and had shot at Morris's car in retaliation for his showing "disrespect" toward Kennedy and the Eastside Gangster Crips by stealing Kennedy's gold chain. The trial court properly balanced the gang evidence's probative value against the danger of unfair prejudice to Franklin and Johnson.

The State demonstrated a sufficient connection between Franklin's and Johnson's gang affiliations and the crimes charged. Accordingly, we hold that the challenged gang evidence satisfied the requirements of ER 404(b) and that the trial court did not abuse its discretion in admitting the gang affiliation evidence.

II. Evidence Sufficiency

Franklin separately argues that, absent an improper inference that he had a propensity to commit violent crimes because he was a gang member, the State presented insufficient evidence to support his convictions for any of the charged crimes or for the gang-aggravating sentencing-enhancement factors. These arguments fail.

When reviewing a challenge to the sufficiency of the evidence, we ask whether, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (en banc). Circumstantial evidence and direct evidence

are equally reliable. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005). A reviewing court must also defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

A. Drive-by Shooting and First Degree Assault: Accomplice

Franklin first argues that the State presented insufficient evidence to support his drive-by shooting and first degree assault convictions because there was no evidence that, although he was in the Ford Explorer, he had knowledge that he was promoting or facilitating the commission of these crimes. We disagree.

At the outset we note that Franklin does not challenge the sufficiency of the evidence that someone else (e.g., Kennedy and/or Johnson) committed the charged crimes. Instead, he argues that the State failed to produce evidence of his "knowledge" that he was promoting or facilitating other persons' commission of these crimes, sufficient to support his accomplice liability. Br. of Appellant (Franklin) at 40. Thus, we focus our analysis on the sufficiency of the evidence to support Franklin's culpability as an accomplice.

A defendant is an "accomplice" if, with knowledge that it will promote or facilitate the crime, he either (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a). To be an accomplice, the defendant must act with knowledge that he is promoting or facilitating *the* specific crime charged, not simply "a crime." *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). To be culpable as an accomplice, however, the defendant need not participate in the crime, have specific knowledge of every element of the

crime, or share the same mental state as the principal. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Thus, even if the jury did not believe that Franklin fired the shots from the Ford Explorer, the jury could still find him guilty of drive-by shooting and first degree assault if the State proved he was an accomplice of the person who did fire the shots. RCW 9A 08.020.

> A person commits drive-by shooting
>
> when he . . . *recklessly* discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is . . . from a motor vehicle.

RCW 9A.36.045(1) (emphasis added). A jury may infer reckless conduct where a person unlawfully discharges a firearm from a moving vehicle. RCW 9A.36.045(2).

A person commits first degree assault if he, with intent to commit great bodily harm, "[a]ssaults another with a firearm . . or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). RCW 9A.04.110(4)(c) defines "[g]reat bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ."

Franklin contends the State presented insufficient evidence to support the knowledge element of his accomplice liability because (1) the State's evidence showed only that he was a gang member and that gang members retaliate against rival gangs' showing disrespect; and (2) there was no evidence that he was in the Ford Explorer with the "intent to aid in the shooting" rather than being merely "someone present when the shooting occurred." Br. of Appellant (Franklin) at 58. According to Franklin, Washington law does not allow the jury to infer that he knew he was aiding in the crimes based on the circumstances surrounding the shooting. Franklin

mistakenly relies on *State v. Bluehorse*, in which we held that generalized expert testimony about "gang culture" *alone* was insufficient to support the gang-aggravating sentencing factor for Bluehorse's exceptional sentence because the evidence failed to show that he had committed the drive-by shooting "for reasons related to obtaining or maintaining gang membership or advancing [status] in the gang." *State v Bluehorse*, 159 Wn. App. 410, 429, 431, 248 P.3d 537 (2011).

But unlike the gang aggravating sentencing factor in *Bluehorse* and the street gang aggravating sentencing factors discussed below, here, the State did not need to present evidence that Franklin had aided in committing the drive-by shooting and assault for gang membership purposes in order to prove his accomplice liability for these underlying crimes. Instead, the State needed to prove only the elements of accomplice liability—i.e., that Franklin had solicited, commanded, encouraged, requested, aided, or agreed to aid in the commission of the crimes with "general knowledge" that his actions were "promoting or facilitating" these crimes. *Cronin*, 142 Wn.2d at 579. We hold that the State met its burden here.

We acknowledge that Franklin's mere physical presence and assent alone were insufficient to constitute aiding and abetting. Nevertheless, "[p]resence at the scene of an ongoing crime may be sufficient if a person is 'ready to assist.'" *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting *State v. Aiken*, 72 Wn.2d 306, 349, 434 P.2d 10 (1967), *vacated on other grounds by Wheat v. Washington*, 392 U.S. 652, 88 S. Ct. 2302, 20 L. Ed. 2d 1387 (1968)). A person is "'ready to assist'" if he, in some way, associates himself with the undertaking, participates in it as something he desires to bring about, or by his actions seeks to make it succeed. *Wilson*, 91 Wn.2d at 491 (quoting *Aiken*, 72 Wn.2d at 349).

Here, in addition to the challenged gang evidence, the State presented strong circumstantial evidence that Franklin was a knowing and willing participant in the drive-by shooting and resulting assault on bystander Grossman seated in his (Grossman's) truck: Franklin was at The Friendly Duck bar with Kennedy when Ragland called Kennedy, asking him to come to the 54th Street Bar and Grill, where rival Morris was present. Franklin then texted his girlfriend that he had just gotten "jacc't," and he was going to "give some[one] the blues." 11 VRP at 1320. Less than a minute later, Franklin got into the Ford Explorer and rode off with Kennedy, Evans, and Johnson to the 54th Street Bar and Grill, where the Ford Explorer eventually got directly behind Morris's car and someone in the Explorer shot at it. Mere minutes after the shooting, Franklin exited the Explorer at the Chevron station while Kennedy and Johnson disposed of the two weapons used in the shooting. Based on this evidence—particularly Franklin's contemporaneous text messages to his girlfriend that he had just gotten "jacc't" and he was going to "give some[one] the blues"—a rational jury could conclude that he was "ready to assist" in the shooting of Morris's car and that he was present in the Ford Explorer with knowledge that his actions were promoting or facilitating the commission of the crimes 11 VRP at 1320. Looking at the evidence post conviction in the light most favorable to the State, as we must, we hold that the State presented sufficient evidence that Franklin was an accomplice to the drive-by shooting and the resulting assault on Grossman.

B. *Unlawful Possession of a Firearm*

Franklin next argues that the State presented insufficient evidence to support his unlawful possession of a firearm conviction because the State did not prove that he possessed a firearm. The State responds the jury can infer that Franklin and Johnson had joint possession of the

firearm fired from the backseat because (1) they both "shared [the gang's] intent and purpose" to use this gun to shoot at Morris's car, and (2) both had ready access to the gun depending on which side of the Explorer eventually provided the best shot at Morris's car. Br of Resp't at 21.

A person is guilty of first degree unlawful possession of a firearm "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter." RCW 9.41.040(1)(a).[24] A "[s]erious offense" includes a felony for "[a]ny crime of violence," such as first degree robbery RCW 9.41.010(16)(a);[25] *State v Rivera*, 95 Wn. App. 132, 137, 974 P.2d 882, 992 P.2d 1033 (2000). Franklin testified that he had been previously convicted of such a "serious offense"; thus, the State did not need to offer additional proof that he could not lawfully possess a firearm. RCW 9.41.010(16)(a); *Rivera*, 95 Wn. App. at 137. To prove possession, the State had to show that Franklin either actually or constructively possessed a firearm. *State v Roberts*, 80 Wn. App. 342, 353, 908 P.2d 892 (1996) Actual possession requires physical custody. *State v Cantabrana*, 83 Wn App. 204, 206, 921 P.2d 572 (1996). Although the jury returned a special verdict that Franklin committed his crimes while armed with a firearm, the record

[24] The legislature amended RCW 9.41.040 in 2011. LAWS OF 2011, ch. 193, § 1. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[25] The legislature amended RCW 9.41.010 in 2009. LAWS OF 2009, ch. 216, § 1. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

contains no admissible evidence that Franklin actually possessed a firearm.[26] Constructive possession, however, (1) may be established by showing that the defendant had "dominion and control over the firearm or over the premises where the firearm was found,"[27] (2) need not be exclusive, and (3) may include joint possession with another person. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026 (1995) (citing *State v. Harris*, 14 Wn. App. 414, 417, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976)). Although a defendant's close proximity to an object alone is insufficient to establish constructive possession,[28] other facts may enable a trier of fact to infer dominion and control, such as the defendant's "ability to reduce an object to actual possession." *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

In determining whether a defendant exercised the requisite dominion and control over an object, we consider the "totality of the circumstances"; no single factor is dispositive. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016 (1995). The State presented evidence that *two* guns were used to shoot at Morris's car from the Ford Explorer. Although Kennedy testified that he had fired both guns from the front passenger seat, at least two

[26] The trial court admitted Ringer's hearsay testimony—that Kennedy had told him Franklin and Johnson had each brought a gun with them the night of the shooting and that Franklin had handed one of the guns to Kennedy to shoot while Johnson had shot the other one from the back passenger seat—only for impeachment purposes; and the trial court so instructed the jury. Thus, Ringer's hearsay testimony did not provide substantive evidence that Franklin actually possessed a firearm.

[27] *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

[28] *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

eye witnesses reported having seen shots being fired from the back passenger seat, where Johnson had been seated, next to Franklin, seated behind the driver.

As we have explained in sections I and II.B. of this Analysis, the State presented admissible evidence that (1) gang members commit crimes to avenge disrespect and to increase their status within the gang; (2) Franklin was a member of Kennedy's gang, with which Evans and Johnson were also affiliated; (3) Franklin was a knowing and willing participant in the drive-by shooting of rival gang member Morris's car, as evinced by his (Franklin's) response to Kennedy's invitation to "go out"[29] with him, his (Franklin's) text to his girlfriend that he was going to "give some[one] the blues,"[30] and his (Franklin's) riding with Kennedy, Evans, and Johnson in the Ford Explorer to the 54th Street Bar and Grill, where the Ford Explorer eventually got directly behind Morris's car and shot at it, (4) one of the two guns used in the shooting appeared to have been fired from the backseat, where Franklin and Johnson were both seated, with no known barriers between them to prevent their handing the gun to whichever of them was ultimately positioned on the side of the Explorer closer to Morris's car and, thus, better able to shoot at it; and (5) right after the shooting, Franklin exited the Explorer at the Chevron station while Kennedy and Johnson disposed of the two weapons used in the shooting. From this evidence, a reasonable jury could infer joint cooperation among these specific gang members in their mission to avenge Morris's disrespect of and theft from Kennedy. Viewing the evidence in the light most favorable to the State, we hold that a rational jury could conclude that Franklin had constructive possession of a firearm because he had the ability "to reduce" the firearm in the

[29] 13 VRP at 1635.

[30] 11 VRP at 1320.

Explorer's back seat to his "actual possession." *Echeverria*, 85 Wn. App. at 783. We further hold, therefore, that the State presented sufficient evidence to support Franklin's first degree unlawful possession of a firearm conviction.

C. Aggravating Gang-Related Sentencing Factors

Franklin also argues that the State presented insufficient evidence to support his gang aggravating sentencing factors because (1) the State relied solely on Ringer's generalized expert testimony that gang members commit crimes to avenge disrespect and to increase their status within the gang, but (2) it did not present any evidence that Franklin's alleged drive-by shooting and assault on Grossman actually benefited his gang. This argument fails.

Under RCW 9.94A.535(3)(aa), the trial court may impose a sentence above the standard range if the jury finds beyond a reasonable doubt that "[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." RCW 9.94A.535(3)(aa). We previously upheld a gang aggravating sentencing factor where the State presented evidence that (1) the defendant was a member of the Hilltop Crips; (2) he perceived the victim as a member of a rival gang; (3) the two gangs had a previous confrontation four days earlier, during which a Hilltop Crips member threatened to open fire on the rival gang; and (4) the defendant shot the victim after uttering, "'This is Hilltop Crip, cuz, what you know about that.'" *Yarbrough*, 151 Wn. App. at 97 (quoting verbatim report of proceedings). In *Yarbrough*, there was expert testimony that calling a rival gang member "'cuz'" is an insulting challenge showing disrespect, that gang members gain status in a gang by showing their willingness to fire weapons to defend the gang's honor, and that a gang member

perceived as unwilling to defend his "'home boys'" may be kicked out. *Yarbrough*, 151 Wn. App. at 97 (quoting verbatim report of proceedings). We held that a jury could infer from this evidence that the defendant had committed the crime to advance or to maintain his position in the gang.[31] *Yarbrough*, 151 Wn. App. at 97.

Similarly here, Franklin admitted having been "jumped into" the Eastside Gangster Crips, having several gang tattoos, and having a blue bandanna (symbolizing gang affiliation) on him the night of the shooting. Morris, the intended victim, was a member of the rival gang Young Gangster Crips. A week before the drive-by shooting, the two gangs had engaged in a confrontation, during which fellow Eastside Gangster Crips member Kennedy's gold necklace was stolen and eventually came into Morris's possession. Morris had taunted Kennedy, stating that Kennedy needed "to pay" or "to fight" him to get the necklace back; the two men had continued "having problems" with each other the following week. 9 VRP at 929, 12 VRP at 1451. On the way to the drive-by shooting of Morris's car, (1) Kennedy had collected Franklin and two other men associated with the Eastside Gangster Crips (Johnson and Evans), and (2) Franklin had texted his girlfriend that she should "'use [her] head,'" he was "'handlin'

[31] In contrast, in *Bluehorse*, we reversed a gang-aggravated sentencing factor based on insufficient evidence where, although the State had presented generalized expert testimony that gang members retaliate against rival gangs for showing disrespect and to advance their status, there was no evidence that Bluehorse (1) had announced a rival gang status contemporaneously with the shooting, (2) had been disrespected or provoked by rival gang members, or (3) had made any statements that he committed the drive-by shooting for reasons related to his gang status. *Bluehorse*, 159 Wn. App. at 430-31. Accordingly, we held that there was insufficient evidence to support an inference that Bluehorse had committed the drive-by shooting "for reasons related to obtaining or maintaining gang membership or advancing [status] in the gang" and, consequently, insufficient evidence to support the gang-related aggravated sentence. *Bluehorse*, 159 Wn. App. at 431. The facts here, however, differ significantly, as we note above

business,'" he had just gotten "jacc't," and he was going to "give some[one] the blues."[32] 11 VRP at 1320.

Ringer testified that (1) a showing of disrespect, such as one gang member's taking another gang member's gold necklace, often results in disproportionate levels of violence in gang culture; (2) both the gang's and an individual gang member's reputations are important, and neither wants to be perceived as "weak"; (3) gang members can gain status within a gang by showing their willingness to participate in drive-by shootings to defend the gang's honor; (4) fellow gang members are expected to "step up" in such situations to help retaliate; and (5) gang members who fail to "step up" face being "checked" by their own gang. 12 VRP at 1484, 1487, 1488. A reasonable jury could infer from this evidence that Franklin participated in the drive-by shooting of Morris's car and in the assault to benefit the Eastside Gangster Crips and/or to advance his (Franklin's) standing in the gang. Accordingly, we hold that the State presented sufficient evidence to support Franklin's gang-aggravated sentencing factors

III. Opinion Testimony

For the first time on appeal, Johnson argues that Ringer's testimony—that gang members are not totally honest with law enforcement "[a]lmost 100 percent of the time"—was an improper comment on his (Johnson's) or another witness's guilt and credibility. Br. of Appellant (Johnson) at 11 (quoting 12 VRP at 1406). The State contends that Johnson failed to preserve this issue for appeal and, therefore, we should not address its substance. We agree with the State.

[32] Although the record does not show that Franklin, like Yarbrough, used recognized gang words like "cuz," the jury could infer that Franklin's text message evinced his gang-related purpose and intent.

A. Scope/Standard of Review

It is uncontroverted that Johnson did not object at trial to this newly-challenged testimony. We may refuse to review any claimed error not raised in the trial court. RAP 2.5(a). Nevertheless, a defendant may challenge a claimed error for the first time on appeal if he can show that it was a manifest constitutional error affecting his constitutional right to a jury trial. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). But "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." *Kirkman*, 159 Wn.2d at 936. To merit appellate review in these circumstances, a defendant must show that the alleged error caused "actual prejudice" or "practical and identifiable consequences" in his trial. *Kirkman*, 159 Wn.2d at 935. In this, Franklin fails.

B. No Explicit Statement; No Constitutional Error

Ringer's challenged statement was not a direct comment about Johnson's individual guilt or credibility; rather, Ringer testified only that gang members are generally unwilling to cooperate with the police, which made Ringer apprehensive about believing Kennedy when he volunteered for a second interview and minimized his involvement in the shooting. Because Johnson did not testify at trial, his credibility was not in issue; Ringer's testimony, which thus did not pertain to Johnson, did not prejudice Johnson.

Similarly, Ringer's concerns about motive arguably pertained only to Kennedy's credibility, not Johnson's. Moreover, Ringer's statements about Kennedy did not express any opinion, directly or indirectly, that Johnson was guilty of the drive-by shooting. Despite expressing some apprehension about Kennedy's offer to participate in a second police interview,

Ringer did not testify that he believed Kennedy was lying during this interview. On the contrary, Ringer testified that, when a gang suspect requests a second interview, he and other police officers generally "work through the issues and try to get as much of the truth out as possible." 12 VRP at 1407. Ringer's testimony thus left open the possibility that portions of Kennedy's interview could have been truthful, despite Ringer's routine skepticism in such situations. Ringer's testimony was not a statement about Kennedy's, Johnson's, or another witness's guilt or credibility. We hold that Ringer's statement did not constitute improper opinion testimony rising to the level of a constitutional error that Johnson can raise for the first time on appeal.[33]

C. No Prejudice; Alleged Error not Manifest

Because Johnson fails to show constitutional error warranting our review of this non-preserved error, we need not address whether the alleged error was "'manifest,'" i.e., whether it was prejudicial or had "'practical and identifiable consequences'" in the trial below. *See* RAP 2 5(a)(3); *State v. Bertrand*, 165 Wn. App. 393, 400 n 8, 267 P.3d 511 (2011) (internal quotation marks omitted) (quoting *State v Grimes*, 165 Wn. App. 172, 185-87, 267 P.3d 454 (2011), *review denied*, 175 Wn.2d 1010 (2012)), *review denied*, 175 Wn.2d 1014 (2012). Nevertheless, we note that Ringer's implied concerns about Kennedy's credibility would not have been prejudicial to Johnson; on the contrary, concerns about Kennedy's credibility would have helped

[33] For non-preserved allegedly improper opinion evidence to qualify under the RAP 2.5(a)(3) exception, "'[m]anifest error' requires a *nearly explicit* statement by the witness that [he] believed the accusing victim'" or disbelieved another key witness. *Kirkman*, 159 Wn.2d at 936 (emphasis added).

Johnson by casting doubt on Kennedy's damaging testimony about Johnson's gang affiliation and involvement in the shooting.[34]

Furthermore, under analogous circumstances, the Washington Supreme Court has concluded that there was no prejudice where, despite allegedly improper opinion testimony on witness credibility, the trial court had properly instructed the jury that jurors "'are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each'" and that jurors "'are not bound'" by expert witness opinions. *Kirkman*, 159 Wn.2d at 937 (quoting Clerk's Papers). The trial court here gave virtually identical instructions,[35] which we presume the jury followed. *Kirkman*, 159 Wn.2d at 937. Thus, even if Ringer's statement had been an unconstitutional, and therefore improper, opinion about Kennedy's, Johnson's, or another witness's guilt or credibility, Johnson fails to show actual prejudice or practical and identifiable consequences to the trial results justifying an exception to RAP 2.5(a)'s preservation requirement that the alleged error be "'manifest.'" *Bertrand*, 165 Wn App at 400 Johnson having failed to show that admission of Ringer's testimony was a manifest constitutional error that may be raised for the first time on appeal under RAP 2.5(a)(3), we do not further address his

[34] For this reason, as in *Kirkman*, Johnson's counsel may have chosen not to object to Ringer's testimony as a matter of trial strategy. *See Kirkman*, 159 Wn.2d at 937. In *Kirkman*, the Supreme Court also noted that such tactical reasons helped show that the defendant did not suffer any prejudice under the RAP 2.5(a)(3) analysis. *See Kirkman*, 159 Wn.2d 937.

[35] The trial court instructed the jury:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness

CP at 473 (Instruction 1).

improper opinion testimony argument.

We affirm Franklin's and Johnson's convictions and Franklin's gang-enhanced standard-range sentences.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Johanson, A.C.J.

Bjorgen, J.

APPENDIX "D"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ~~DESMOND RAY JOHNSON~~ and KEVIN WAYNE FRANKLIN, Appellants.	No 42027-9-II (consol w/42031-7-II) MANDATE Pierce County Cause Nos. ~~09-1-02725-2~~ and 09-1-02724-4

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 30, 2013 became the decision terminating review of this court of the above entitled case on October 2, 2013. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor Respondent State: $9.00
Judgment Creditor A.I.D.F.: $20,068.80
Judgment Debtor Appellant Johnson: $8,051.39
Judgment Debtor Appellant Franklin: $12,026.41

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 21st day of October, 2013.

Clerk of the Court of Appeals,
State of Washington, Div. II

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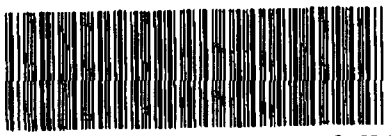
APPENDIX "E"



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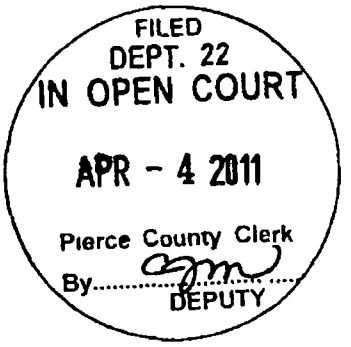

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number 09-1-02724-4

MEMORANDUM OF JOURNAL ENTRY

vs

FRANKLIN, KEVIN WAYNE

Judge JOHN R HICKMAN
Court Reporter Emily Dirton
Judicial Assistant/Clerk Connie Mangus

GREGORY L GREER	Prosecutor
MICHAEL JOSEPH UNDERWOOD	Defense Attorney

Proceeding Set. JURY TRIAL

Proceeding Date 02/28/11 8 30

Proceeding Outcome: HELD

Resolution: Convict JV After Trial

Clerk's Code:
Proceeding Outcome code.**JTRIAL**
Resolution Outcome code:**CVJV**
Amended Resolution code

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2
Certified By: Kevin Stock Pierce County Clerk, Washington

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs.

FRANKLIN, KEVIN WAYNE

Cause Number 09-1-02724-4
MEMORANDUM OF JOURNAL ENTRY

Judge JOHN R HICKMAN

MINUTES OF PROCEEDING

Judicial Assistant/Clerk Connie Mangus Court Reporter Emily Dirton
Start Date/Time: 02/28/11 2:46 PM

February 28, 2011 02:46 PM This case is called for trial. Present is DPA Greg Greer on behalf of the State of Washington. Also present is:

Attorney William Ferrell with his client, **Desmond Johnson** (09-1-02725-2);
Attorney Barbara Corey with her client, **Conrad Evans** (09-1-02723-6); and
Attorney Mike Underwood with his client, **Kevin Franklin** (09-1-02724-4) (In custody; other two defendants are out of custody).

The parties introduce themselves for the record. The Court addresses all parties with regard to trial scheduling. **02:50 PM** DPA Greer updates the Court with regard to the 3.5 hearings in front of Judge McCarthy. **02:53 PM** Attorney Corey addresses the Court. **02:55 PM** Other pretrial issues are addressed by the prosecutor. **02:57 PM** Pretrial issues are addressed by Attorney Underwood. **02:58 PM** Pretrial issues are addressed by Attorney Ferrell. **02:58 PM** The Court advises counsel how trial are held in Department 22 **03:26 PM** Case adjourns.

End Date/Time: 02/28/11 3:26 PM

Judicial Assistant/Clerk. Connie Mangus Court Reporter.Emily Dirton
Start Date/Time: 03/01/11 10:21 AM

March 01, 2011 10:12 AM The case goes on the record at the special request of DPA Greg Greer and Attorney Barbara Corey. Attorney Barbara Corey addresses the Court, stating they have reached a resolution with regard to her client, Defendant Conrad Evans, and would like to take a plea at 4 this afternoon. **10:14 AM** Attorney Greer addresses the Court. **10:16 AM** The plea for Mr. Evans will be taken at 3:00 this afternoon Ms. Corey is released until 3:00 this afternoon. **10:17 AM** Case recesses

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2
Certified By: Kevin Stock Pierce County Clerk, Washington

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs

FRANKLIN, KEVIN WAYNE

Cause Number: 09-1-02724-4
MEMORANDUM OF JOURNAL ENTRY

Judge JOHN R. HICKMAN

MINUTES OF PROCEEDING

10:28 AM Court reconvenes. Present for trial is DPA Greg Greer, on behalf of the State of Washington. Also present is Attorney William Ferrell with his client, Desmond Johnson, and Attorney Mike Underwood, with ihs client, Kevin Franklin, in custody. **10:30 AM** The 3.5 issues are discussed. **10:35 AM** Attorney Underwood addresses the 3.5 issues.

10:36 AM Attorney Underwood argues his **motion to sever trial**.
10:39 AM DPA Greer gives argument against to sever trial.
10:40 AM Attorney Underwood responds.
10:42 AM The Court denies the motion to sever trial.

10:43 AM DPA Greer addresses the Court with regard to a witness (Hudson).
10:45 AM The Court responds.
10:45 AM Attorney Ferrell responds.
10:47 AM Attorney Underwood responds.
10:47 AM The Court gives direction to the prosecutor with regard to this issue.
10:48 AM DPA Greer responds to ruling and gives additional information.
10:52 AM The Court gives additional rulings.
10:53 AM Attorney Ferrell responds.
10:54 AM Attorney Underwood responds
10:54 AM Court declines the offer.

10:59 AM Motions in limine are either identified as either "agreed" or "disagreed/reserved" by the State. We use Attorney Corey's motion in limine filed under 09-1-02723-6. **11:04 AM** Juror #39 is excused for cause **11:05 AM** Motion in limine #10 is argued by DPA Greer. **11:18 AM** Attorney Ferrell responds as to gang membership/association **11:19 AM** Attorney Underwood concurs with Attorney Ferrell. **11:19 AM** The Court gives its ruling. **11:20 AM** Motion in limine #13 is argued by DPA Greer. **11:21 AM** Attorney Ferrell

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STATE OF WASHINGTON

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responds. **11:22 AM** The Court gives its ruling. **11:23 AM** The first motion in limine #15 is argued by DPA Greer. **11:26 AM** Attorney Ferrell responds. **11:27 AM** The Court gives its ruling. **11:28 AM** The second motion in limine #15 is argued by DPA Greer. **11:29 AM** The Court gives its ruling. **11:29 AM** Motion in limine #16 is argued by DPA Greer. **11:31 AM** The Court gives its preliminary ruling. **11:31 AM** Attorney Ferrell responds. **11:32 AM** The Court gives its ruling; reserves last issue as to the closing argument. **11:33 AM** DPA Greer responds to ruling. **11:36 AM** Motion in limine #19 is argued by DPA Greer. **11:37 AM** The Court gives its ruling. **11:37 AM** Motion in limine #28 is argued by DPA Greer. **11:39 AM** Attorney Ferrell responds. **11:40 AM** The Court gives its ruling. **11:42 AM** DPA Greer addresses the Court with regard to DPA Jason Ruyf being allowed to appear co-counsel. No objection; request granted. **11:47 AM** Evidence retrieval is discussed. **11:51 AM** Trial recesses until 1:30.

End Date/Time: 03/01/11 11:51 AM

Judicial Assistant/Clerk: Connie Mangus
Start Date/Time: 03/01/11 1:49 PM

Court Reporter Emily Dirton

March 01, 2011 01:49 PM Trial resumes with all parties present. List of witnesses is provided to the Court for jury purposes. **02:02 PM** The Court discloses to the parties that he has had a prior professional relationship with Juror #28 **02:04 PM** Juror #46 is excused for cause, Juror #58 is excused for cause as she is nowhere to be found. **02:17 PM** The jurors are seated, DPA Greer asks for a sidebar discussion. **02:18 PM** The Court introduces the its staff to the jury and addresses them. **02:21 PM** The jury panel is administered the oath **02:22 PM** The jury is given introductory instructions, introduction of the parties, and general case description. The Court asks general questions of the jury. **02:55 PM** The jury has been released for the day. After a motion by the prosecutor, Juror #40 is excused for cause. **03:00 PM** Trial recesses until 9:15 tomorrow morning.

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End Date/Time: 03/01/11 3:00 PM

Judicial Assistant/Clerk Connie Mangus — Court Reporter Emily Dirton
Start Date/Time: 03/02/11 9:39 AM

March 02, 2011 09:38 AM Trial resumes with all parties present. Juror #8 is excused for cause as a result of her mother having a heart attack. Additional witness are identified for the Court. Other pre-trial issues are discussed. **10:00 AM** The jurors are seated. **10:02 AM** Juror #3 supplements the questions asked of him yesterday. **10:03 AM** Juror #9 supplements the questions asked of her yesterday. **10:05 AM** The Court continues asking general questions of the jury. **10:25 AM** The jury answers the biography questions **11:01 AM** Court takes its morning break. **11:26 AM** Court reconvenes with jurors seated. Some jurors supplement the answers to the Court's questions.

11:30 AM *DPA Greer conducts voir dire.*
11:59 AM Jury released until 1:30. Court stays on the record to discuss voir dire. **12:12 PM** Court recesses until 1:30.

End Date/Time: 03/02/11 12:11 PM

Judicial Assistant/Clerk Connie Mangus — Court Reporter Emily Dirton
Start Date/Time: 03/02/11 1:45 PM

March 02, 2011 01:44 PM Court reconvenes with all parties present. Discussion regarding bringing up those juries with hardships for private voir dire. **01:51 PM** The JA goes down to jury administration to get jurors (1, 2, 4, 5, 6, 7, and 10) who have been identified as hardships. **01:59 PM** Juror #1 is brought into the courtroom for private voir dire. **02:06 PM** The juror steps out of the courtroom Juror #1 is discussed. Juror #1 is excused for cause **02:10 PM** Juror #2 is brought into the courtroom for private voir dire. **02:13 PM** The juror steps out of the courtroom. Juror #2 is discussed. Juror #2 is excused for cause. **02:17**

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PM Juror #4 is brought into the courtroom for private voir dire. Juror #4 is excused for cause. **02:23 PM** Juror #5 is brought into the courtroom for private voir dire. **02:26 PM** Juror #6 is brought into the courtroom for private voir dire. **02:28 PM** Juror #7 is brought into the courtroom for private voir dire. **02:32 PM** Juror #10 is brought into the courtroom for private voir dire Juror #10 steps out of the courtroom. Juror #10 is discussed. **02:45 PM** Juror #14 is brought into the courtroom for private voir dire. **02:49 PM** Juror #16 is brought into the courtroom for private voir dire. **02:52 PM** Juror #17 is brought into the courtroom for private voir dire. Juror #17 is excused for cause **02:56 PM** Juror #18 is brought into the courtroom for private voir dire **03:03 PM** Juror #21 is brought into the courtroom for private voir dire. **03:10 PM** Juror #22 is brought into the courtroom for private voir dire. **03:14 PM** Court takes its afternoon break. **03:30 PM** Juror #23 is brought into the courtroom for private voir dire. **03:37 PM** Juror #26 is brought into the courtroom for private voir dire. **03:39 PM** Juror #26 leaves the courtroom. Juror #26 is discussed. DPA *Greer moves to have this juror excused for cause. Juror #26 is excused for cause.* **03:44 PM** Juror #29 is brought into the courtroom for private voir dire. **03:48 PM** Juror #29 leaves the courtroom. Juror #29 is discussed. Juror #29 is excused for cause. **03:53 PM** Juror #31 is brought into the courtroom for private voir dire. **03:59 PM** Juror #34 is brought into the courtroom for private voir dire. **04:05 PM** Juror #34 goes back down to jury administration Discussion regarding last two jurors that have been interviewed. **04:10 PM** Juror #36 is brought into the courtroom for private voir dire. **04:21 PM** Court recesses until 9 AM tomorrow morning.

End Date/Time: 03/02/11 4:21 PM

Judicial Assistant/Clerk Connie Mangus
Court Reporter:Emily Dirton
Start Date/Time: 03/03/11 9:18 AM

March 03, 2011 09:18 AM Trial resumes with all parties present. The JA goes and obtains jurors number 37, 38, 41, 43, 45 and 47 for private voir dire **09:27 AM** Juror #37 is brought

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into the courtroom for private voir dire. **09:34 AM** Juror #37 is excused for cause. **09:34 AM** Juror #38 is brought into the courtroom for private voir dire **09:37 AM** Juror #38 is excused for cause. **09:38 AM** Juror #41 is brought into the courtroom for private voir dire. **09:45 AM** Juror #41 steps out of the courtroom. Juror #41 is discussed **09:47 AM** DPA Greer moves that Juror #41 be excused for cause. Juror #41 is excused for cause. **09:50 AM** Juror #43 is brought into the courtroom for private voir dire. **09:54 AM** Juror #43 is excused for cause. **09:56 AM** Juror #45 is brought into the courtroom for private voir dire. Juror #45 steps outside of the courtroom. Juror #45 is discussed Juror #45 is excused for cause. **10:02 AM** Juror #47 is brought into the courtroom for private voir dire Juror #47 steps out of the courtroom. Juror #47 is discussed. **10:07 AM** The JA goes and obtains jurors, numbers 49, 50, 51, 53, 54, and 55, for private questioning. **10:21 AM** Juror #49 is brought into the courtroom for private voir dire Juror #49 is excused for cause. **10:26 AM** Juror #50 is brought into the courtroom for private voir dire. Juror #50 is excused for cause. **10:29 AM** Juror #51 is brought into the courtoom for private voir dire. **10:32 AM** Juror #53 is brought into the courtroom for private voir dire. **10:36 AM** Juror #54 is brought into the courtroom for private voir dire. **10:41 AM** Juror #55 is brought into the courtroom for private voir dire. **10:51 AM** Private voir dire concludes. DPA Greer moves that Juror #54 be excused for cause. **10:52 AM** Attorney Ferrell responds. **10:55 AM** Juror #54 is excused for cause. **10:57 AM** Court takes it morning break. The jurors are brought up. **11:27 AM** Court reconvenes and Attorney Ferrell conducts 30 minutes of voir dire. **11:56 AM** The jury is released until 1.30. Juror #36 stays behind and give additional information to the court with regard to a hardship. **11:57 AM** The Court puts the in-chambers meeting on the record with regard to Juror #44 being excused for cause. The sidebar discussion is also put on the record with regard to Juror #40. **11:59 AM** The in-chambers meeting is put on the record with regard to defendant JOHNSON contact with the judge. **12:02 PM** Jury selection process is discussed. **12:03 PM** Additional voir dire is discussed. No opening statements will be given today. **12:05 PM** The Court addresses the issue with regard to Juror #51 hearing Defendant family members behind her talking about the case. **12:12 PM**

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Case adjourns until 1.30.

End Date/Time: 03/03/11 12:12 PM

Judicial Assistant/Clerk Connie Mangus
Court Reporter Emily Dirton
Start Date/Time: 03/03/11 1:52 PM

March 03, 2011 01:52 PM Court reconvenes. **01:53 PM** Bringing Juror #51 up to the courtroom, for private questioning, is discussed. Discussion regarding asking the family members to step outside while Juror #51 is brought up for private questioning. **01:55 PM** The Court recesses to read case law on this issue. **02:12 PM** Court reconvenes. The Court has reviewed case law. The Court gives its ruling on this issue. **02:15 PM** DPA Greer responds to ruling. **02:16 PM** Attorney Ferrell responds to ruling. **02:16 PM** Attorney Underwood has no disagreement with the Court's ruling. **02:17 PM** The family members are asked to leave the courtroom so that we can interview juror #51. **02:22 PM** Juror #51 is brought into the courtroom for private questioning. **02:39 PM** The 40 jurors are brought up and seated. **02:40 PM** DPA Greer asks for sidebar discussion. The JA leaves the courtroom with the jurors, all except the last row of jurors, who are questioned individually. **02:56 PM** The JA is back in the courtroom with the rest of the jury. The family members are asked to come back in again. **02:57 PM** Attorney Underwood conducts 30 minutes of voir dire. **03:15 PM** DPA Greer conducts 20 minutes of voir dire. **03:35 PM** Attorney Ferrell conducts 20 minutes of voir dire. **03:50 PM** The Court gives cautionary instructions to the jury before releasing them for the day. **03:55 PM** DPA Greer moves to excuse Juror #7 for cause Juror #7 is excused for cause. **03:56 PM** Court recesses until 9 AM Monday morning.

End Date/Time: 03/03/11 3:56 PM

Judicial Assistant/Clerk LINDA SCHRAMM
Court Reporter Emily Dirton
Start Date/Time: 03/07/11 8:58 AM

JUDGE JOHN R HICKMAN Year 2011

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March 07, 2011 09:29 AM

Court reconvenes All parties present. 09:30 AM Colloquy re: juror # 10 called in sick today. 09:31 AM Juror #10 excused for cause. 09:31 AM Colloquy re: Remaining voir dire status and 3.6 hearing. 09:37 AM The Court gives people in the gallery cautionary instruction. 09:38 AM Jury administration contacted to bring up jurors. 09:40 AM Recess. 09:47 AM Court reconvened. Jury panel present. 09:48 AM Voir dire by Mr Greer. 10:06 AM Voir dire by Mr Ferrell. 10:08 AM The Court addresses the jury panel as to the selection process. 10:07 AM Counsel exercise peremptory challenges. 10:31 AM Remaining panel excused. 10:31 AM Seated jury panel seated. 10:33 AM The Court gives seated jury cautionary instruction before releasing for short morning break. 11.04 AM Court reconvenes. 11:05 AM Colloquy re: 3.5, 3.6 motions. 11:09 AM Jury seated, sworn and instructed by the Court. 11:27 AM Jury excused for lunch. 11:29 AM The Court proceeds with 3.6 hearing. 11:29 AM Mr Ferrell presents arguments to the Court. 11:31 AM Mr Ruyf responds. 11:41 AM Mr Ferrell responds. 11:41 AM The Court responds. 11:41 AM Mr Underwood responds. 11:44 AM The Court denies motion to suppress. 11:45 AM Mr Ruyf addresses the Court as to addtional motion and time of day. Court responds, set motion over to 1:30 PM. 11:56 AM Recess.

End Date/Time: 03/07/11 12:00 PM

Judicial Assistant/Clerk: LINDA SCHRAMM
Start Date/Time: 03/07/11 1:22 PM

Court Reporter Emily Dirton

March 07, 2011 01:40 PM

Court reconvenes. All parties present. Jury not present. 01 40 PM The Court proceeds with 404B motion . 01:40 PM Mr Ruyf addresses the Court. 01:41 PM Mr Ruyf presents arguments. 01.43 PM The Court responds. 01:43 PM Mr Ferrell responds. 01:43 PM Mr Ruyf continues arguments. 01 52 PM The Court responds. 01:52 PM Mr Ruyf responds 01:53 PM The Court responds 01:53 PM Mr Ruyf responds. 01:58 PM Mr Ferrell

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responds. 02:00 PM Mr Underwood responds. 02:02 PM Mr Ruyf responds. 02:03 PM Mr Underwood responds. 02.04 PM The Court gives ruling, granting limiting instruction. 02:06 PM Mr Ruyf argues next issue. 02:09 PM Mr Ferrell responds. 02:11 PM Mr Underwood responds. 02:12 PM Mr Ruyf responds. 02:13 PM The Court gives rulings, granting motion, with limiting instruction. 02.14 PM Mr Ruyf agrues next issues with gang status. 02:23 PM Mr Ferrell responds. 02.25 PM Mr Underwood responds. 02:26 PM Mr Ruyf responds. 02:27 PM Mr Ferrell responds. 02:27 PM The Court rules. 02:28 PM Mr Ferrell responds. 02:28 PM Mr Ruyf responds. 02.29 PM Mr Ferrell responds. 02:29 PM Mr Ruyf responds. 02:32 PM Mr Ferrell responds. 02:33 PM Mr Ruyf responds. 02:34 PM The Court rules. 02:35 PM Mr Ferrell responds. 02:35 PM The Court responds. 02:38 PM Mr Ferrell responds. 02:41 PM Jury seated. 02:41 PM Opening statement by Mr Greer on behalf of the State. 03:06 PM Mr Ferrell on behalf of defendant Desmond Johnson reserves opening statement. 03:13 PM Mr Underwood on behalf of defendant Kevin Franklin reserves opening statement. 03 13 PM Jury excused for break. 03:12 PM **P-Exh. # 1, 2, Stipulations, admitted.** 03:07 PM Recess. 03:32 PM Court reconvenes. 03:32 PM Mr Ferrell discloses non direct contact on break with juror #1. 03:36 PM Jury re-seated 03.36 PM The Court reads stipulations, P-Exh #1 and P-Exh #2 for the record. 03:38 PM State calls witness, **JEREMY BERNTZEN.** Witness is duly sworn and testifies on direct examination by Mr Greer. 03:40 PM P-Exh #30 marked for illustrative purposes only. 04:06 PM The Court gives jury cautionary instruction and excuses for the day, return tomorrow at 9:00 AM. 04:08 PM Witness stands down and excused and instructed to return tomorrow at 9:00 AM. 04:09 PM Colloquy re: scheduling. 04:09 PM Counsel excused. 04:17 PM Recess

End Date/Time: 03/07/11 4:00 PM

Judicial Assistant/Clerk LINDA SCHRAMM
Court Reporter Emily Dirton
Start Date/Time: 03/08/11 8:44 AM

JUDGE JOHN R HICKMAN Year 2011

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March 08, 2011 09:20 AM Court reconvenes. All parties present. 09:20 AM Mr Ferrell addresses the Court as to cross examination. 09:20 AM Mr Underwood responds. 09:26 AM Jury seated. 09:26 AM Colloquy re: juror #9 and hearing device. 09:26 AM Witness, **JEREMY BERNTZEN** resumes the stand under cross examination by Mr Ferrell. 09:37 AM Cross examination by Mr Underwood. 09:39 AM Re-direct by Mr Greer. 09:41 AM Re-cross by Mr Ferrell. 09:42 AM Re-cross by Mr Underwood. 09:44 AM Witness stands down and excused. 09:44 AM State calls witness, **BENJAMIN GROSSMAN.** Witness is duly sworn and testifies on direct examination by Mr Greer. 10:07 AM Cross by Mr Ferrell. 10:11 AM Cross by Mr Underwood. 10:14 AM Re-direct by Mr Greer. 10:19 AM Re-cross by Mr Ferrell 10:20 AM Re-cross by Mr Underwood. 10:21 AM Witness stands down and excused. 10:21 AM State calls witness, **RAINA PROSKE.** Witness is duly sworn and testifies on direct examination by Mr Greer. 10:32 AM *P-Exh #31 marked for illustrative purposes only.* 10:34 AM *Cross by Mr Ferrell.* 10:36 AM Witness stands down and excused. 10:36 AM Jury excused for morning break. 10:38 AM Recess 10:59 AM Court reconvenes. 11:01 AM Jury re-seated. 11:02 AM State calls witness, **TIFFANY BUCHANAN.** Witness is duly sworn and testifies on direct examination by Mr Greer. P-Exh. #32 marked for illustrative purposes only. 11:17 AM Objection by Mr Ferrell, overruled by the Court. Direct exam resumes. 11:29 AM Witness stands down and excused. 11:29 AM State calls witness, **DARLENE ESQUEDA.** Witness is duly sworn and testifies on direct examination by Mr Greer. P-Exh. #33 marked for illustrative purposes only. 11:47 AM Cross by Mr Ferrell. 11:50 AM Cross by Mr Underwood. 11:57 AM Witness stands down and excused. 11:57 AM Jury excused for lunch break and given cautionary instruction. 12:00 PM Colloquy re: Mr Greer addresses personal statement to the witnesses. 12:01 PM Recess.

End Date/Time: 03/08/11 12:01 PM

Judicial Assistant/Clerk. LINDA SCHRAMM
Start Date/Time: 03/08/11 1:24 PM

Court Reporter.Emily Dirton

JUDGE JOHN R HICKMAN Year 2011

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March 08, 2011 01:39 PM

Court reconvenes. All parties present 01:41 PM Jury re-seated. 01:41 PM State calls witness, **DAWN BOUTA.** Witness is duly sworn and testifies on direct examination by Mr Greer. 01:47 PM Cross examination by Mr Ferrell. 01:48 PM Cross by Mr Underwood. 01:48 PM Witness stands down and excused. 01:49 PM State calls witness, **OFFICER GERALD TURNEY,TPD.** Witness is duly sworn and testifies on direct examination by Mr Greer. 02:03 PM Mr Ferrell declines cross. 02:03 PM Cross by Mr Underwood. 02:04 PM Re-direct by Mr Greer. 02:13 PM Mr Ferrell declines re-cross. 02:13 PM Re-cross by Mr Underwood. 02:14 PM Witness stands down and excused. 02:14 PM State calls witness, **OFFICER CHRISTOPHER MARTIN.** Witness is duly sworn and testifies on direct examination by Mr Greer. 02:26 PM Recess.

End Date/Time: 03/08/11 2:26 PM

Judicial Assistant/Clerk. Connie Mangus Court Reporter Emily Dirton
Start Date/Time: 03/08/11 2:53 PM

March 08, 2011 02:53 PM Trial resumes and the jury is seated. The Court asks Juror #7 if he missed any testimony due to his bloody nose.

02:59 PM **Officer Martin** retakes the stand and DPA Greer resumes direct examination on him. **03:16 PM** Attorney Ferrell conducts cross examination on Officer Martin. **03:22 PM** Attorney Underwood conducts cross examination on Officer Martin **03:27 PM** DPA Greer conducts redirect examination on Officer Martin. **03:31 PM** With no further questions, this witness is excused.

03:32 PM The State calls **Officer Brandon Mires** to the stand and he is sworn in.
03:32 PM DPA Greer conducts direct examination on Officer Mires.
03:44 PM Attorney Ferrell conducts cross examination on Officer Mires

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03:46 PM Attorney Underwood passes on cross examination.
03:46 PM With no further questions, this witness is excused.

03:47 PM The State calls **Laurel Hassberger** to the stand and she is sworn in
03:48 PM DPA Greer conducts direct examination on Ms. Hassberger.
03:59 PM Court recesses. Trial will resume on Monday, March 14, 2011. Jury is released and reminded of their instructions.

End Date/Time: 03/08/11 4:00 PM

Judicial Assistant/Clerk: Connie Mangus
Court Reporter:Emily Dirton
Start Date/Time: 03/14/11 9:21 AM

March 14, 2011 09:20 AM Trial resumes with all parties present. All jurors are present and have been marked into attendance. DPA Greer addresses the Court with regard to a request for a material witness warrant (Jenkins). **09:24 AM** Attorney Ferrell addresses this issue. **09:25 AM** Attorney Underwood addresses this issue. **09:26 AM** DPA Greer responds. **09:26 AM** The Court grants the motion for the material witness warrant. **09:31 AM** The jury is seated.

09:33 AM **Laurel Hassberger** retakes the stand and DPA Greer resumes direct examination on her. **09:35 AM** **Plaintiff's Exhibit #27 (Photos 1 through 22)** is offered and admitted without objection. **09:37 AM** **Plaintiff's Exhibit #37** is offered and admitted without objection. **09:54 AM** Plaintiff's Exhibit #15 is offered Attorney Ferrell voir dires the witness with regard to this exhibit. **09:55 AM** **Plaintiff's Exhibit #15** is admitted without objection. **10:02 AM** **Plaintiff's Exhibit #16** is offered and admitted without objection. **10:14 AM** **Plaintiff's Exhibit #40** is offered and admitted without objection. **10:15 AM** Attorney Ferrell conducts cross examination on Ms. Hassberger. **10:17 AM** Attorney Underwood conducts cross examination on Ms. Hassberger. **10:23 AM** Subject to recall,

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this witness steps down.

10:24 AM The State calls **Bret Terwilliger** to the stand and he is sworn in.
10:25 AM DPA Greer conducts direct examination on Officer Terwilliger
10:28 AM No cross exam conducted. With no further questions, this witness is excused.

10:28 AM The State calls **James Curfman** to the stand and he is sworn in.
10:30 AM DPA Greer conducts direct examination on Mr. Curfman.
10:34 AM Attorney Ferrell conducts cross examination on Mr. Curfman.
10:34 AM With no further questions, this witness is excused.

10:34 AM The Jury is excused for its morning break. DPA Greer addresses the Court with regard to the next witness. **10:37 AM** Attorney Underwood addresses the Court with regard to the written diagram Ms. Hassberger testified to. **10:37 AM** DPA Greer responds. **10:39 AM** Court takes its morning break. **11:16 AM** Court reconvenes and the jury is seated.

11:18 AM The State calls **Portia Steverson** to the stand and she is sworn in.
11:20 AM DPA Greer conducts direct examination on Ms Steverson.
11:27 AM Attorney Underwood conducts cross examination on Ms. Steverson.
11:27 AM With no further questions, this witness is excused.

11:27 AM The State calls **Nicholas Jensen** to the stand and he is sworn in.
11:28 AM DPA Greer conducts direct examination on Officer Jensen.
11:46 AM The witness identifies the defendants in open court.
12:00 PM Court recesses until 1:30.

End Date/Time: 03/14/11 12:00 PM

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Judicial Assistant/Clerk: Connie Mangus Court Reporter: Emily Dirton
Start Date/Time: 03/14/11 1:47 PM

March 14, 2011 01:46 PM Court reconvenes with all parties present. Attorney Underwood addresses the Court with regard to a juror contact in the restroom during the break. **01:49 PM** Plaintiff's Exhibit #20 is offered by DPA Greer. There is a stipulation among the parties as to authenticity. **01:50 PM Plaintiff's Exhibit #20** is admitted without objection. **01:53 PM** The jury is seated.

01:53 PM **Officer Jensen** retakes the stand and DPA Greer resumes direct examination on him. **01:59 PM Plaintiff's Exhibit #7** is offered and admitted without objection. Pages of this exihbit are published to the jury by way of overhead projector. **02:09 PM Plaintiff's Exhibit #47** is offered and admitted. It is published to the jury. **02:13 PM** Plaintiff's Exhibit #20 is published to the jury. **02:38 PM Plaintiff's Exhibit 8-A** is offered and it is admitted without objection. **02:39 PM** Attorney Ferrell now objects to the admission of this exhibit based on the piece of paper that was found with the phone. **02:41 PM** Plaintiff's Exhibit 8-B is offered. Attorney Ferrell objects as there is another piece of white paper in with this exhibit. DPA Greer asks the witness to pull out the piece of paper. **02:42 PM** The jury is released to the jury room to take up this issues outside of their presence. All 4 pieces of paper are marked as Plaintiff's Exhibit 8-D. **02:52 PM** Attorney Ferrell addresses the Court with regard to the cell phone issue (we only have three in evidence and there should be five) **02:53 PM** DPA Greer addresses the 5 evidentiary stickers on the bag (Plaintiff's Exhibit #8). **Plaintiff's Exhibits 8-A, 8-B and 8-C** are admitted for demonstrative purposes. **03:02 PM** The jury is reseated and DPA Greer resumes direct examination on Officer Jensen. **03:08 PM** Court takes its afternoon break. **03:24 PM** Court reconvenes. **03:25 PM** We interrupt Officer Jensen's testimony to take a witness out of order.

03:27 PM The State calls **Helena Waara** to the stand and she is sworn in.
03:29 PM DPA Greer conducts direct examination on Ms. Waara.

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SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2
Certified By: Kevin Stock Pierce County Clerk, Washington

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs

FRANKLIN, KEVIN WAYNE

Cause Number. 09-1-02724-4
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Judge JOHN R HICKMAN

MINUTES OF PROCEEDING

03:32 PM *Attorney Ferrell conducts cross examination on Ms. Waara.*
03:33 PM Attorney Underwood conducts cross examination on Ms. Waara.
03:33 PM With no further questions, this witness is excused.

03:34 PM **Officer Jensen** retakes the stand and Attorney Ferrell conducts cross examination on him. **03:40 PM** Attorney Underwood conducts cross examination on Officer Jensen. **03:42 PM** With no further questions, this witness is excused.

03:42 PM The State calls **Zachary Spangler** to the stand and he is sworn in.
03:43 PM DPA Greer conducts direct examination on Officer Spangler.
03:45 PM The witness identifies DEFENDANT "FRANKLIN" in open court.
03:55 PM *The witness identifies DEFENDANT "JOHNSON" in open court.*
03:56 PM Attorney Ferrell conducts cross examination on Officer Spangler.
04:00 PM DPA Greer conducts redirect examination on Officer Spangler.
04:01 PM With no further questions, this witness is excused.

04:01 PM Court recesses until 9 AM tomorrow morning; jury excused for the day.

End Date/Time: 03/14/11 4:02 PM

Judicial Assistant/Clerk. Connie Mangus
Start Date/Time: 03/15/11 9:17 AM

Court Reporter.Emily Dirton

March 15, 2011 09:16 AM *Trial resumes with all parties present. Juror #12 called in ill this* morning and it is addressed. **09:18 AM** DPA Greer would like Juror #12 to be excused. **09:18 AM** Attorney Ferrell would like to wait to see if Juror #12 is better tomorrow; Attorney Underwood joins in on Attorney Farrell's recommendation. **09:19 AM** The Court makes its ruling and will excuse Juror #12 from this case. **09:23 AM** The jury is seated Alternate Juror #1 takes Juror #12's place. The jury is marked into attendance.

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09:24 AM The State calls **Sergeant Mark Eakes** to the stand and he is sworn in. **09:24 AM** DPA Greer conducts direct examination on Sergeant Eakes.
09:39 AM Attorney Ferrell conducts cross examination on Sergeant Eakes. **09:40 AM** DPA Greer conducts redirect examination on Sergeant Eakes
09:41 AM With no further questions, this witness is excused.

09:41 AM The State calls **Paul Depoister** to the stand and he is sworn in.
09:42 AM DPA Greer conducts direct examination on Mr. Depoister.
10:23 AM DPA Greer moves the Court for a recess. **10:25 AM** The jury is released, but we stay on the record to address a report and the weapons. The Court wants to make sure these weapons have locks on them once they are opened. **10:27 AM** DPA Greer addresses Plaintiff's Exhibit #21. The seal is broke on the evidence envelope and it is reviewed by all parties. Mr. Underwood will take the two pieces of paper and makes copies with the Court's approval **10:29 AM** Court takes its morning break. **10:58 AM** Trial resumes. DPA Ruyf addresses the Court with regard to a stipulation. **11:00 AM** Attorney Ferrell responds. **11:04 AM** Additional plaintiff's exhibits are marked. **11:06 AM** The jury is reseated DPA Greer resumes direct examination on Mr. Depoister. It is stipulated that this witness can testify to the forensic evidence. **11:09 AM** DPA Greer offers **Plaintiff's Exhibit #54** and it is admitted without objection. **11:12 AM** DPA Greer offers Plaintiff's Exhibit #52. Attorney Underwood objects. **11:14 AM** The jury is released to the jury room to take up the objection outside of their presence. DPA Greer responds to the objection. **11:16 AM** The Court reviews Plaintiff's Exhibit #52. **11:19 AM** The Court rules and admits **Plaintiff's Exhibit #52** over the objection. **11:19 AM** DPA Greer lays additional foundation for this exhibit. **11:22 AM** The jury is reseated and DPA Greer resumes direct examination on Mr. Depoister. **11:23 AM** Plaintiff's Exhibit #17 is handed to the witness for identification. **11:26 AM** DPA Greer offers **Plaintiff's Exhibit #17** and it is admitted without objection **11:27 AM** With no objection, the witness steps down from the stand and

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publishes Plaintiff's Exhibit #17 to the jury. **11:30 AM** DPA Greer offers **Plaintiff's Exhibit #19** and it is admitted without objection. **11:31 AM** Attorney Ferrell conducts cross examination on Mr. Depoister **11:38 AM** Attorney Underwood conducts cross examination on Mr. Depoister. **11:45 AM** DPA Greer conducts redirect examination on Mr. Depoister. **11:52 AM** Attorney Ferrell conducts recross examination on Mr. Depoister. **11:53 AM** Attorney Underwood conducts recross examination on Mr. Depoister **11:54 AM** DPA Greer conducts redirect examination on Mr. Depoister. **12:02 PM** Attorney Ferrell conducts recross examination on Mr. Depoister. **12:08 PM** Attorney Underwood conducts recross examination on Mr. Depoister. **12:09 PM** With no further questions, this witness is excused.

12:09 PM *Court recesses until 1:30.*

End Date/Time: 03/15/11 12:10 PM

Judicial Assistant/Clerk Connie Mangus
Court Reporter.Emily Dirton
Start Date/Time: 03/15/11 1:42 PM

March 15, 2011 01:42 PM Court reconvenes with all parties present. **01:45 PM** The jury is seated.

01:45 PM *The State calls* **Lisa Rossi** *to the stand and she is sworn in.*
01:46 PM DPA Greer conducts direct examination on Ms Rossi.
02:05 PM DPA Greer offers **Plaintiff's Exhibit #9** for admission and it is admitted without objection. **02:11 PM** Plaintiff's Exhibit #10 is handed to the witness for identification. **02:13 PM** DPA Greer offers **Plaintiff's Exhibit #10** for admission and it is admitted without objection. With permission, the witness leaves the stand and publishes Plaintiff's Exhibit #10 to the jury. **02:17 PM** **Plaintiff's Exhibit #14** is offered and admitted without objection **02:19 PM** **Plaintiff's Exhibit #12** is offered for admission and publication and it

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is admitted and published to the jury. **02:22 PM Plaintiff's Exhibit #11** is offered and admitted without objection. **02:25 PM Plaintiff's Exhibit #13** is offered and admitted without objection It is also published to the jury without objection. **02:28 PM** Neither defense counsel have questions for this witness. With no further questions, she is excused.

02:28 PM The State calls **Jennifer Strain** to the stand and she is sworn in.
02:29 PM DPA Greer conducts direct examination on Officer Strain.
02:37 PM Plaintiff's Exhibit #48 is offered and admitted without objection. Plaintiff's Exhibit #48 is published to the jury without objection. **02:52 PM** The jury is excused from the courtroom to take up an objection outside of their presence. Attorney Ferrell argues his objection to testimony. **02:55 PM** DPA Greer responds to the objection. **02:59 PM** Attorney Ferrell responds. **03:00 PM** Attorney Underwood responds. **03:01 PM** The Court gives its ruling. The Court asks the State to limit their questioning with regard to "Oakes". **03:03 PM** DPA Greer responds to ruling. **03:07 PM** Attorney Ferrell gives additional argument. **03:08 PM** The Court gives additional ruling as to shell casings and caliber. **03:09 PM** Attorney Ferrell asks clarifying questions. DPA Greer responds. **03:12 PM** DPA Greer addresses the Court with regard to the "stolen car", the Explorer. **03:15 PM** Attorney Ferrell responds. **03:16 PM** Attorney Underwood responds. **03:18 PM** DPA Greer responds **03:21 PM** Court takes its afternoon break. **03:39 PM** Court reconvenes. **03:41 PM** The jury is reseated and DPA Greer resumes direct examination on Officer Strain. **03:42 PM** Attorney Ferrell passes on cross. **03:42 PM** Attorney Underwood conducts cross examination on Officer Strain. **03:43 PM** With no further questions, this witness is excused.

03:43 PM The State calls **Jeff Crowder** to the stand and he is sworn in.
03:44 PM DPA Greer conducts direct examination on Officer Crowder.
03:48 PM With no cross examination, this witness is excused.

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03:49 PM The State calls **Jeffrey Robillard** to the stand and he is sworn in.
03:49 PM DPA Greer conducts direct examination on Officer Robillard.
03:58 PM Attorney Ferrell conducts cross examination on Officer Robillard.
03:58 PM Attorney Underwood conducts cross examination on Officer Robillard. **03:59 PM** With no further questions, this witness is excused.

04:00 PM The jury is given cautionary instructions and released for the day
04:02 PM DPA Greer addresses the Court. with regard to the "stolen car".
04:06 PM Attorney Underwood responds as to "common scheme".
04:07 PM Court reserves ruling. Court adjourns.

End Date/Time: 03/15/11 4:07 PM

Judicial Assistant/Clerk. Connie Mangus
Court Reporter:Emily Dirton
Start Date/Time: 03/16/11 9:32 AM

March 16, 2011 09:31 AM Trial resumes with all parties present. The jurors are present and have been marked into attendance. DPA Greer addresses the Court with regarding to two in-custody witnesses and the "stolen car" issue. **09:34 AM** The Court gives ruling on the "stolen car" issue. **09:35 AM** DPA Greer responds **09:40 AM** The jury is seated.

09:40 AM The State calls **Brenda Lawrence** to the stand and she is sworn in.
09:40 AM DPA Greer conducts direct examination on Ms. Lawrence.
10:12 AM The witness leaves the stand to make a diagram, which will be marked as Plaintiff's Exhibit 63. **10:42 AM** The Court takes its morning break. **11:05 AM** Court reconvenes One juror is missing. DPA Greer offers **Plaintiff's Exhibit #55** and it is admitted without objection. **11:10 AM** The jury is reseated and Attorney Ferrell conducts cross examination on Ms. Lawrence. **11:13 AM** Attorney Underwood does not conduct cross examination on Ms. Lawrence. With no redirect examination, this witness is excused.

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11:13 AM The State calls **Frederick "Philip" Pavey** to the stand and he is sworn in
11:14 AM DPA Ruyf conducts direct examination on Detective Pavey.
11:23 AM Plaintiff's Exhibit #60 is handed to the witness for identification.
11:24 AM DPA Ruyf offers **Plaintiff's Exhibit #60** and it is admitted without objection.
11:27 AM Plaintiff's Exhibit #59 is handed to the witness for identification **11:29 AM** DPA Ruyf offers **Plaintiff's Exhibit #59** and it is admitted without objection. **11:32 AM** With no cross examination by either defense counsel, this witness is excused.

11:33 AM The State calls **Stefanie Willrich** to the stand and she is sworn in.
11:34 AM DPA Ruyf conducts direct examination on Detective Willrich.
11:42 AM With no cross examination by either defense counsel, this witness is excused.

11:43 AM The State calls **Louise Nist** to the stand and she is sworn in.
11:43 AM DPA Greer conducts direct examination on Detective Nist.
11:58 AM Court recesses for the noon hour.

End Date/Time: 03/16/11 11:58 AM

Judicial Assistant/Clerk. Connie Mangus
Court Reporter Emily Dirton
Start Date/Time: 03/16/11 1:42 PM

March 16, 2011 01:41 PM Court reconvenes. DPA Greer addresses the Court with regard to the next two witnesses and the presence of additional court security. DPA Greer calls down for the next witness and we wait before bringing out the jury. **01:52 PM** The jury is seated.

01:52 PM The State calls **Curtis Hudson** to the stand and he is sworn in.
01:54 PM DPA Greer conducts direct examination on Mr. Hudson.

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01:55 PM **Plaintiff's Exhibit #46** is offered and it is admitted without objection. **02:05 PM** The jury is released to the jury room to take up an objection outside of their presence. **02:08 PM** The Court rules on the objection. **02:09 PM** DPA Greer gives an offer of proof on another issue and asks the witness quesitons. **02:14 PM** The jury is reseated and DPA Greer resumes direct examination on Mr. Hudson. **02:17 PM** Plaintiff's Exhibit #46 is put up on the easel and the witness leaves the stand to use this diagram **02:25 PM** Attorney Ferrell conducts cross examination on Mr. Hudson. **02:27 PM** Attorney Underwood conducts cross examination on Mr. Hudson **02:29 PM** DPA Greer conducts redirect examination on Mr. Hudson. **02:30 PM** With no further questions, this witness is excused.

02:31 PM The State calls **Marcus Jenkins** to the stand and he is sworn in.
02:33 PM DPA Greer conducts direct examination on Mr. Jenkins.
02:37 PM The witness identifies Defendant Johnson in open court.
02:42 PM The witness leaves the stand to use Plaintiff's Exhibit #46.
02:46 PM Plaintiff's Exhibit #53 is shown to the witness.
02:49 PM Attorney Ferrell does not conducts cross exam on this witness.
02:49 PM Attorney Underwood conducts cross examination on Mr Jenkins.
02:50 PM With no further questions, this witness is excused.

02:52 PM Court takes its afternoon break **03:08 PM** Court reconvenes. DPA Greer addresses the Court with regard to Detective Nist's testimony and the "stolen vehicle" issue. **03:10 PM** Attorney Underwood responds **03:11 PM** The Court responds/rules. **03:13 PM** Attorney Ferrell asks clarifying questions. **03:14 PM** Attorney Underwood then asks clarifying questions of DPA Greer. **03:15 PM** The jury is seated.

03:17 PM **Detective Nist** is recalled to the stand and DPA Greer resumes direct examination on her. **03:25 PM** Plaintiff's Exhibit #65 is shown to the witness for

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identification. **03:29 PM** Attorney Ferrell conducts cross examination on Detective Nist. **03:33 PM** Attorney Underwood does not conduct cross examination on tihs witness. **03:34 PM** At the request of DPA Greer, the jury is released to the jury room to take up an issue outside of their presence. DPA Greer addresses the Court with regard to the weapons. **03:36 PM** Attorney Ferrell objects and responds. **03:40 PM** DPA Greer responds. **03:42 PM** Attorney Ferrell responds and Attorney Underwood joins in on his argument. **03:42 PM** DPA Greer responds. **03:43 PM** Attorney Underwood responds **03:44 PM** The Court gives a ruling; DPA Greer responds as to a limiting instruction. **03:45 PM** The Court overrules the objectoin based on offer of proof. **03:47 PM** The jury is reseated. **03:48 PM** DPA Greer conducts redirect examination on Detective Nist **03:50 PM** With no further questions, this witness is excused.

03:50 PM *The Court is given cautionary instructions and released for the day.*
03:52 PM Court adjourns until 9 AM tomorrow morning.

End Date/Time: 03/16/11 3:52 PM

Judicial Assistant/Clerk. Connie Mangus
Court Reporter Emily Dirton
Start Date/Time: 03/17/11 9:21 AM

March 17, 2011 09:21 AM Trial resumes with all parties present. All jurors are here and have been marked into attendance Attorney Ferrell puts the incidental contact with the juror yesterday on the record. Connie Mangus, JA, supplements the record. **09:22 AM** Attorney Underwood addresses the Court. He is ill today and advises the Court of that. **09:22 AM** DPA Ruyf addresses the Court with regard to the next withess and how it may lead into a 404(b) situation. **09:25 AM** Attorney Ferrell responds. **09:27 AM** Attorney Underwood responds. **09:28 AM** The Court addresses this issue. **09:28 AM** DPA Ruyf responds. **09:30 AM** The Court reviews case authority. **09:30 AM** Attorney Ferrell responds. **09:35 AM** Colloquy re: case law. **09:38 AM** Court takes a brief recess to review

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case law. The jury advised of the delay as "house keeping matters". **09:55 AM** Court reconvenes and the Court gives its ruling **09:57 AM** Clarifying questions are answered **09:59 AM** DPA Greer addresses another issue. **10:02 AM** Attorney Ferrell responds. **10:07 AM** The jury is seated.

10:07 AM The State calls **Henry Betts** to the stand and he is sworn in
10:08 AM DPA Ruyf conducts direct examination on Officer Betts.
10:17 AM The witness identifies Defendant Franklin in open court.
10:22 AM Attorney Ferrell passes on cross examination.
10:22 AM Atttorney Underwood conducts cross examination on Officer Betts.
10:27 AM DPA Ruyf conducts redirect examination on Officer Betts.
10:29 AM With no further questions, this witness is excused.

10:29 AM The State calls **Mardre Combs** to the stand and he is sworn in.
10:30 AM DPA Greer conducts direct examination on Mr. Combs.
10:38 AM The witness identifies Defendant Franklin in open court.
10:54 AM Attorney Ferrell passes on cross examination.
10:54 AM Attorney Underwood conducts cross examination on Mr. Combs.
10:58 AM DPA Greer conducts redirect examination on Mr. Combs.
11:03 AM Attorney Underwood conducts recross examination on Mr. Combs.
11:03 AM With no further questions, this witness is excused.

11:03 AM Court takes its morning break to allow the State to make contact with their next witness. **11:32 AM** Court reconvenes. **11:33 AM** DPA Greer addresses the Court with regard to the next witness's immunity and hands forth an order. **11:34 AM** Portia Steverson and her counsel step forward. Attorney Jennifer Vickers Freeman is present with Ms. Steverson. The Court asks questions of Ms. Vickers Freeman. **11:36 AM** Ms Vickers Freeman speaks quietly with her client. **11:37 AM** DPA Greer responds **11:39 AM** The

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Court again addresses Ms. Steverson with regard to her taking the 5th and her immunity during testimony. **11:39 AM** Attorney Ferrell responds. **11:41 AM** Both defense counsel reviews the Order Granting Immunity. **11:43 AM** Ms. Steverson requests to speak to her attorney in private and they step outside the courtroom **11:45 AM** Ms. Steverson comes back into the courtroom with her attorney and Ms. Vickers Freeman addresses the Court. **11:55 AM** The jury is seated.

11:55 AM The State recalls **Portia Steverson** to the stand and she is sworn in.
11:56 AM DPA Greer conducts direct examination on Ms. Steverson.
12:08 PM Plaintiff's Exhibit #66 is handed to the witness.
12:14 PM Attorney Ferrell and Attorney Underwood pass on cross.
12:14 PM With no further questions, this witness is excused.

End Date/Time: 03/17/11 12:14 PM

Judicial Assistant/Clerk. Connie Mangus
Start Date/Time: 03/17/11 1:42 PM

Court Reporter Emily Dirton

March 17, 2011 01:41 PM Court reconvenes with all parties present. DPA Greer addresses the Court with regard to this afternoon's witnesses. **01:44 PM** The jury is seated.

01:44 PM The State recalls **Nicholas Jensen** to the stand and he is sworn in.
01:45 PM DPA Greer conducts direct examination on Officer Jensen.
01:51 PM Attorney Ferrell conducts cross examination on Officer Jensen.
01:52 PM Attorney Underwood conducts cross examination on Officer Jensen/
01:52 PM With no further questions, this witness is excused.

01:54 PM Court recesses to allow the State to get their next witness.

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02:09 PM Trial reconvenes and the jury is seated.

02:09 PM The State calls **Jerome R. Kennedy** to the stand and he is sworn in.
02:11 PM DPA Greer conducts direct examination on Mr. Kennedy.
02:54 PM Attorney Ferrell conducts cross examination on Mr. Kennedy.
02:55 PM Attorney Underwood conducts cross examination on Mr. Kennedy.
03:04 PM DPA Greer conducts redirect examination on Mr. Kennedy.
03:11 PM Attorney Underwood conducts recross examination on Mr. Kennedy.
03:11 PM With no further questions, this witness is excused.

03:16 PM Court takes a break. **03:30 PM** Court reconvenes and the jury is seated.

03:32 PM The State recalls **Paul Depoister** to the stand and he is sworn in.
03:33 PM DPA Greer conducts direct examination on Mr. Depoister.
03:33 PM Plaintiff's Exhibit #53 is handed to the witness for identification.
03:34 PM **Plaintiff's Exhibit #53** is offered and admitted without objection.
03:34 PM With no cross examination, this witness is excused.

03:35 PM The State recalls **Louise Nist** to the stand and she is sworn in
03:36 PM DPA Greer conducts direct examination on Detective Nist
03:44 PM With no cross examination, this witness is excused.

03:44 PM With no further witnesses for the day, the jury is given cautionary instructions and released until 9 AM on Monday, March 21, 2011 Trial adjourns.

End Date/Time: 03/17/11 3:53 PM

Judicial Assistant/Clerk: Connie Mangus
Start Date/Time: 03/21/11 9:40 AM

Court Reporter Emily Dirton

JUDGE JOHN R HICKMAN Year 2011

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March 21, 2011 09:39 AM Trial resumes with all parties present. All jurors are present and have been marked into attendance. Attorney Barbara Corey is also present this morning as her client, Conrad Evans, will be the first witness called this morning. The Court addresses trial scheduling and jury instructions with the parties. **09:42 AM** Attorney Corey addresses the Court with regard to her client's testimony **09:45 AM** Court takes a recess until Conrad Evans is present in the courtroom, in custody. **09:51 AM** Court reconvenes and the jury is seated.

09:52 AM The State calls **Conrad Evans** to the stand and he is sworn in
09:53 AM DPA Greer conducts direct examination on Mr. Evans.
10:01 AM The witness asks for a break so that he can speak with his attorney. The jury is excused to the jury room. The judge leaves the bench and Attorney Corey speaks with her client in private. **10:03 AM** Court reconvenes, the jury is seated and DPA Greer resumes direct examination on Mr. Evans. **10:10 AM** The witness identifies Defendant Johnson in open court. **10:34 AM** Attorney Ferrell conducts cross examination on Mr. Evans. **10:37 AM** Attorney Underwood conducts cross examination on Mr. Evans. **10:41 AM** DPA Greer conducts redirect examination on Mr. Evans **10:46 AM** Attorney Underwood conducts recross examination on Mr. Evans. **10:46 AM** With no further questions, this witness is excused.

10:48 AM Court takes its morning break. **11:10 AM** Court reconvenes and the jury is seated.

11:10 AM The State calls **Steven Cales** to the stand and he is sworn in.
11:12 AM DPA Greer conducts direct examination on Mr Cales.
11:18 AM **Plaintiff's Exhibit #28** is offered and admitted without objection.
11:34 AM Attorney Ferrell conducts cross examination on Mr. Cales.

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MEMORANDUM OF JOURNAL ENTRY

Judge JOHN R. HICKMAN

MINUTES OF PROCEEDING

11:42 AM Attorney Underwood conducts cross examination on Mr. Cales.
11:50 AM DPA Greer conducts redirect examination on Mr Cales.
11:56 AM Attorney Ferrell conducts recross examination on Mr. Cales
11:59 AM Attorney Underwood conducts recross examination on Mr. Cales.
12:00 PM With no further questions, this witness is excused.

12:01 PM Court recesses until 1:30.

End Date/Time: 03/21/11 12:01 PM

Judicial Assistant/Clerk: Connie Mangus
Court Reporter Emily Dirton
Start Date/Time: 03/21/11 1:38 PM

March 21, 2011 01:37 PM Trial resumes with all parties present and the jury is seated.

01:39 PM The State calls **John Bair** to the stand and he is sworn in.
01:40 PM DPA Ruyf conducts direct examination on Detective Bair.
01:50 PM Plaintiff's Exhibit #41 is offered Attorney Ferrell objects to its admission. **01:50 PM** The Court asks to see this exhibit. The jury is excused to the jury room to take up this objection outside of their presence. **Plaintiff's Exhibit #41** will be admitted, however, the State will need to provide a clean copy without the highlighting **01:56 PM** The jury is reseated and DPA Ruyf resumes direct examination on Detective Bair. **01:58 PM** **Plaintiff's Exhibit #68 is offered for demonstrative purposes** and it is admitted without objection. Plaintiff's Exhibit #68 is published to the jury. **02:09 PM** Plaintiff's Exhibit #42 is offered. Attorney Ferrell objects. The jury is excused to the jury room so that Attorney Ferrell can voir dire this witness with regard to Exhibit #42. **02:13 PM** DPA Ruyf asks questions of this witness based on Attorney Ferrell's voir dire. **02:14 PM** Attorney Ferrell asks additional questions of tihs witness. **02:16 PM** The jury is reseated and the Court admits **Plaintiff's Exhibit #42** without objection. **02:19 PM** **Plaintiff's Exhibit #43** is

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STATE OF WASHINGTON

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offered and admitted without objection **02:22 PM Plaintiff's Exhibit #44** is offered and admitted without objection. **02:27 PM Plaintiff's Exhibit #45** is offered and admitted without objection. **02:35 PM** Attorney Ferrell conducts cross examination on Detective Bair **02:39 PM** Attorney Undrewood conducts cross examination on Detective Bair. **02:48 PM** DPA Rufy conducts redirect examination on Detective Bair. **02:49 PM** With no further questions, this witness is excused.

02:49 PM The jury is released for their afternoon break. We stay on the record, at the request of DPA Greer, who addresses the testimony of the next witness. **02:54 PM** DPA Ruyf will be allwed to remove State's Exhibits 41 through 45 to make clean copies, without the highlights. **02:54 PM** Court takes its afternoon break. **03:16 PM** Court reconvenes and the jury is seated.

03:16 PM The State calls **Brian Vold** to the stand and he is sworn in.
03:16 PM DPA Greer conducts direct examination on Detective Vold.
03:27 PM The witness identifies Defendant Johnson in open court.
03:33 PM Attorney Ferrell conducts cross examination on Detective Vold.
03:37 PM Attorney Underwood conducts cross examination on Detective Vold.
03:39 PM With no further questions, this witness is excused

03:40 PM The State calls **John Ringer** to the stand and he is sworn in
03:41 PM DPA Greer conducts direct examination on Detective Ringer.
04:05 PM Plaintiff's Exhibit #22 is offered and admitted without objection.

04:09 PM Case adjourns for the day.

End Date/Time: 03/21/11 4:10 PM

JUDGE JOHN R HICKMAN Year 2011

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Judicial Assistant/Clerk Connie Mangus Court Reporter Emily Dirton
Start Date/Time: 03/22/11 9:11 AM

March 22, 2011 09:11 AM Trial resumes with all parties present. The jury is present and have been marked into attendance. **09:12 AM** DPA Ruyf addresses Exhibits #41 through #45. **09:13 AM** Attorney Ferrell responds. **09:15 AM** The jury is seated.

09:15 AM DPA Greer resumes direct examination on **Detective John Ringer**. **09:17 AM Plaintiff's Exhibit #23** is offered and admitted without objection. It is also published to the jury. **09:34 AM** The jury is released to the juryroom to take up an objection outside of their presence. Attorney Ferrell addresses his objection. **09:35 AM** DPA Greer responds. **09:36 AM** The Court overrules the objection. **09:39 AM** A limiting instruction is discussed. **09:42 AM** The jury is seated and the judge gives them an oral limiting instruction **09:43 AM** DPA Greer resumes direct examination on Detective Ringer. **10:12 AM** The jury is released from the courtroom to take up an objection outside of their presence. DPA Greer responds to Attorney Ferrell's objection, citing hearsay. **10:12 AM** Attorney Ferrell responds. **10:14 AM** DPA Greer responds, citing impeachment reasons. **10:19 AM** The Court will allow officer to talk about the issue at hand. **10:23 AM** The jury is reseated and they are given another limiting instruction with regard to Mr. Kennedy. **10:23 AM** DPA Greer resumes direct examination on Detective Ringer. **10:30 AM DPA Greer moves to publish Plaintiff's Exhibit #60, which has been previously admitted. Attorney Ferrell asks questions regarding this. With no objection by defense counsel, permission to publish is granted. 10:33 AM** Plaintiff's Exhibit #48 is published to the jury. **10:38 AM** DPA Greer moves to publish Plaintiff's Exhibit #59. State is having technical difficulties. DPA Greer resumes questioning of Detective Ringer. **10:52 AM** The Court takes its morning break **11:11 AM** Court reconvenes. **11:14 AM** The jury is seated. They are advised of an extended lunch hour as the judge has an obligation outside of the building at noon. **11:14 AM** DPA Greer resumes direct examination on Detective Ringer **11:42 AM** The jury is released to the jury room to take up Attorney Ferrell's objection

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outside of their presence. Attorney Ferrell's argues his objection. **11:44 AM** Attorney Greer responds. **11:46 AM** The Court rules on this objection. **11:48 AM** Court recesses until 1:45 this afternoon.

End Date/Time: 03/22/11 11:48 AM

Judicial Assistant/Clerk: Connie Mangus Court Reporter Emily Dirton
Start Date/Time: 03/22/11 1:59 PM

March 22, 2011 01:59 PM Trial resumes with all parties present and the jury is seated. Delay is starting this afternoon due to a medical emergency at the jail.

02:00 PM **Detective Ringer** retakes the stand and DPA Greer resumes direct examination on him. **02:31 PM** Attorney Ferrell conducts cross examination on Detective Ringer. **02:58 PM** Attorney Underwood conducts cross examination on Detective Ringer. **03:24 PM** Court takes its afternoon break. **03:39 PM** Court reconvenes. DPA Greer addresses the Court with regard to Detective Ringer's testimony as it relates to Defendant Franklin. **03:43 PM** Attorney Underwood responds. Packet marked as Plaintiff's Exhibit #78. It is handed to the Court for review of a specific text message. The Court asks questions of Attorney Underwood. **03:53 PM** Attorney Underwood addresses the Court. **03:56 PM** DPA Greer responds. **04:01 PM** The Court rules and will allow the limited testimony, by the State, with regard to what door was opened by defense counsel. **04:03 PM** DPA Greer responds to the ruling and states that Detective Bair will have to be recalled. **04:04 PM** Attorney Underwood responds and his client will enter into a stipulation and Detective Bair will not have to be recalled. **04:06 PM** DPA Ruyf addresses Plaintiff's Exhibit #78 and how those specific text messages will be pulled out and marked as Plaintiff's Exhibit #78A **04:10 PM** The jury is reseated and Attorney Underwood resumes cross examination on Detective Ringer **04:18 PM** DPA Greer conducts redirect examination on Detective Ringer. **04:24 PM** Plaintiff's Exhibit #78A is handed to the witness and the Court advises the jury of the

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stipulation with regard to this exhibit. The jury is instructed that this does not related to Defendant Johnson. **04:27 PM** The jury is released to the jury room. The parties stay on the record and discuss trial scheduling. **04:32 PM** The JA releases the jury and they are instructed to come back at 9 AM tomorrow morning. We are still on the record discussing jury instructions.

End Date/Time: 03/22/11 4:50 PM

Judicial Assistant/Clerk Connie Mangus — Court Reporter Emily Dirton
Start Date/Time: 03/23/11 9:10 AM

March 23, 2011 09:09 AM Trial resumes with all parties present. DPA Greer addresses the Court with regard to case law handed up to the Court as it relates to Crystal Jenkins' tesitmony. **09:11 AM** Attorney Underwood responds as to case law. **09:12 AM** DPA Greer moves to admit Plaintiff's Exhibit #78A. Attorney Underwood objects. **09:16 AM** The Court admits **Plaintiff's Exhibit #78A** over the objection. **09:19 AM** The jury is seated.

09:19 AM **Detective John Ringer** retakes the stand and Attorney Ferrell conducts recross examination on him. **09:22 AM** With no further questions, this witness is excused.

09:22 AM The State rests.

09:23 AM The jury is released, to the jury room, to take up a matter outside of their presence. **09:25 AM** Attorney Underwood gives an offer or proof with regard to Crystal Jenkins' testimony. **09:27 AM** DPA Greer responds. **09:31 AM** The Court gives its ruling as to Ms. Jenkins' testimony. **09:33 AM** The jury is seated.

09:33 AM Attorney Underwood gives Kevin Franklin's opening statement

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09:34 AM Attorney Underwood calls **Crystal Jenkins** to the stand and she is sworn in. **09:37 AM** Attorney Underwood conducts direct examination on Ms. Jenkins. **09:42 AM** DPA Greer conducts cross examination on Ms. Jenkins. **09:54 AM** The jury is released to the jury room to take up an objection, by Attorney Ferrell, outside of their presence. **09:54 AM** DPA Greer responds to the objection. **09:56 AM** The Court responds. **09:58 AM** The jury is reseated and DPA Greer has no further questions. **09:59 AM** Attorney Underwood conducts redirect examination on Ms. Jenkins. **09:59 AM** With no further questions, this witness is excused.

09:59 AM Attorney Underwood calls **Kevin Franklin** to the stand and he is sworn in. **10:01 AM** Attorney Underwood conducts direct examination on Mr. Franklin. **10:41 AM** The jury is given their morning break. We stay on the record. DPA Greer moves the Court to see the witness's tattoos. **10:44 AM** Attorney Underwood responds. **10:45 AM** DPA Greer views Mr. Franklin's arm and neck tattoos with all other attorneys. **10:47 AM** Court takes its morning break. **11:06 AM** Court reconvenes. The jury is reseated and DPA Greer conducts cross examination on Mr. Franklin. **11:31 AM** Attorney Ferrell passes on cross examination With no further questions, this witness steps down.

11:31 AM Attorney Underwood rests on behalf of Mr. Franklin **11:31 AM** Attorney Ferrell waives opening statement and rests on behalf of Mr. Johnson.
11:32 AM DPA Greers asks that the jury be released to the jury room to take up an issue outside of their presence He asks for time to get phone recordings and contact DOC with regard to Mr. Franklin. **11:34 AM** Attorney Ferrell responds. **11:34 AM** Attorney Underwood responds. **11:35 AM** DPA Greer responds. **11:37 AM** The Court rules on these two issues. **11:40 AM** The jury is brought back into the courtroom. The jury will be excused for the day and instructed to return at 9 AM tomorrow morning. They are given cautionary instructions. **11:50 AM** Case adjourns.

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End Date/Time: 03/23/11 11:50 AM

Judicial Assistant/Clerk Connie Mangus — Court Reporter Emily Dirton
Start Date/Time: 03/23/11 1:42 PM

March 23, 2011 01:42 PM Court reconvenes with all parties present. We convenes this afternoon to discuss jury instructions. **01:44 PM** We go off the record with the Court Reporter at this time. The instructions are discussed informally. **02:34 PM** Court takes a brief recess at the request of Attorney Underwood. **02:49 PM** Court reconvenes. Jury instructions are continued to be discussed, off the record with the court reporter **03:14 PM** We go on the record with the court reporter. The Court rules on the limiting instruction with regard to the ownership history of the weapons. The Court denies to give the proposed cautionary instruction on the record. Attorney Underwood and Attorney Ferrell join in an exception. **03:17 PM** Off the record with the court reporter. Court and counsel continue to work on the jury instructions. **03:24 PM** We go back on the record with the court reporter. The parties are discussing a proposed limiting instruction with regard to a phone conversation between Conrad Evans and Portia Steverson. **03:32 PM** The Court denies to include that limiting instruction. **03:33 PM** The instruction is discussed with regard to the Dodge Strattus. **03:35 PM** Plaintiff's proposed jury instructions are identified for exceptions, agreements, numbering and corrections. **04:01 PM** Defendant Johnson's proposed jury instructions are identified for exceptions, agreements, numbering and corrections. **04:06 PM** Defendant Franklin's proposed jury instructions are identified for exceptions, agreements, numbering and corrections. **04:17 PM** The Court denies the State's motion for reconsideration with regard to the accomplice liability instruction **04:19 PM** DPA Greer advises the Court that there may be rebuttal testimony tomorrow morning. **04:20 PM** Court adjourns until tomorrow morning

End Date/Time: 03/23/11 4:20 PM

Judicial Assistant/Clerk: Connie Mangus — Court Reporter Emily Dirton
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Start Date/Time: 03/24/11 9:15 AM

March 24, 2011 09:15 AM Trial resumes with all parties present. We will have rebuttal witnesses this morning. All jurors are present and have been marked into attendance. Jury instructions are discussed. **09:20 AM** Closing arguments are discussed as it relates to *length of arguments.* **09:22 AM** *Rebuttal evidence/ testimony is addressed by DPA Ruyf.* **09:27 AM** Attorney Underwood responds. **09:28 AM** The Court makes rulings on Detective Ringer's rebuttal testimony. **09:29 AM** Attorney Ferrell responds, stating that the rebuttal material does not involve his client. **09:30 AM** DPA Ruyf responds. He advises the Court of what part of the CD (Plaintiff's Exhibit #79) that he will offer for admission and outlines the timeframes on the CDs. **Motion/admission granted as to the 3/23 phone call. Motion/admission granted for 3/20 phone call. Motion/admission granted for the 3/19 phone call (All three phone calls are contained in Plaintiff's Exhibit #79). 09:39 AM** The Court gives ruling on the jail recordings. **09:41 AM** Court recesses to allow Attorney Ferrell to go to a CD court and the State's witness to be advised of Court's rulings **10:00 AM** Court reconvenes. Detective Ringer's testimony is discussed. Detective Ringer will be allowed to stay in the courtroom as the CD is being played for the jury. **10:05 AM** The jury is now seated.

10:05 AM By way of rebuttal evidence, the Court reads a stipulation to the Court as to the recorded phone conversations. **10:06 AM** DPA Ruyf now plays, for the jury, the three segments/phone conversations contained in Plaintiff's Exhibit #79 that have been previously admitted. **10:14 AM** The CD now concludes being played for the jury. **10:15 AM** At the request of DPA Greer, the jury is released to the jury room to take up an issue outside of their presence. **10:28 AM** The jury is reseated.

10:29 AM By way of rebuttal testimony, the State recalls **John Ringer** to the stand and he is sworn in. **10:30 AM** DPA Greer conducts direct examination on Detective Ringer. **10:39 AM** *Attorney Underwood and Attorney Ferrell pass on cross examination. With no further*

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questions, the witness steps down.

10:39 AM The State rests. **10:43 AM** The jury is released to the jury room as the jury instructions and numbered. **10:57 AM** Court recesses to allow DPA Greer to copy off jury instructions. **11:32 AM** Court reconvenes. **11:37 AM** The jury is seated and the Court reads the jury instructions to them. **12:20 PM** Jury instructions are concludes being read to the jury. The jury is given cautionary instructions before being released for lunch **12:22 PM** The jury is released and instructed to return at 1:30. We stay on the record and discuss the jury instructions that had typographical errors. **12:25 PM** Court recesses until 1:30.

End Date/Time: 03/24/11 12:25 PM

Judicial Assistant/Clerk: Connie Mangus Court Reporter Emily Dirton
Start Date/Time: 03/24/11 1:42 PM

March 24, 2011 01:42 PM Court reconvenes with all parties present. DPA Greer addresses the Court with regard to the replacement and corrected jury instructions. **01:44 PM** Attorney Ferrell responds. **01:45 PM** Attorney Underwood responds. **01:53 PM** The jury has been seated; the corrected jury instructions have been replaced with the incorrect instructions in the juror's instructions.

01:53 PM DPA Greer gives closing argument.
02:35 PM Court takes a break. **02:48 PM** Court reconvenes.
02:48 PM Atty. Ferrell gives closing argument on behalf of Desmond Johnson.
03:18 PM The Court asks the jury to stand and take a stretch break.
03:19 PM Atty Underwood gives closing argument on behalf of Kevin Franklin.
03:52 PM DPA Greer gives rebuttal closing argument on behalf of the State.
04:11 PM Closing arguments conclude. **04:15 PM** The alternate juror is given further

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instructions and being temporarily excused. **04:27 PM** All counsel reviews all admitted exhibits to make sure they can go back to the jury to start deliberations. **04:49 PM** The jury leaves for the day and will return at 8:30 AM tomorrow morning to resume deliberations

End Date/Time: 03/24/11 4:49 PM

Judicial Assistant/Clerk Connie Mangus Court Reporter Emily Dirton
Start Date/Time: 03/25/11 8:49 AM

March 25, 2011 08:49 AM All juror are present and have been marked into attendance. They have been delivered the admitted exhibits, original jury instructions and verdict forms and resume deliberations. **09:09 AM** The jury knocks, with a jury question to hear Plaintiff's Exhibit #79. All parties are called to appear. **10:50 AM** We are now on the record. Present is DPA Jason Ruyf, IT person, from Superior Court Administration, Antonio Caro, Attorney William Ferrell, Defendant Desmond Johnson, Defendant Kevin Franklin, and Attorney Richard Whitehead, in for Attorney Michael Underwood. **10:51 AM** Attorney Ferrell addresses the Court with regard to an objection of Plaintiff's Exhibit #79 being played for the jury. **10:53 AM** DPA Ruyf responds to the objection. **10:56 AM** The jury knocks with another question. It is handed forward to the Court. **10:56 AM** Attorney Whitehead addresses the Court and joins in on the objection. **10:58 AM** DPA Ruyf responds to the objection. **10:59 AM** The Court denies Attorney Whitehead's motion. **11:02 AM** DPA Ruyf responds to the Court's question with regard to the times of these phone calls on this CD. **11:03 AM** Attorney Whitehead responds **11:04 AM** The Court asks questions of Antonio Caro and he responds accordingly. **11:05 AM** The Court will allow DPA Ruyf to play the CD in order to ensure that nothing else is heard/played other than the segments that the jury heard the first time it was played **11:08 AM** Attorney Whitehead responds to the Court asking him if he wants an instruction for the Court. Attorney Ferrell joins in with Attorney Whitehead. **11:18 AM** We are now ready to play the CD for the jury. All counsel has also reviewed the second question. **11:19 AM** The jury is brought out to play the CD **11:41 AM**

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The second jury questions is addressed. **11:41 AM** DPA Ruyf addresses the Court with regard to this question. **11:42 AM** Attorney Ferrell addresses the Court with regard to this question. **11:43 AM** Attorney Whitehead concurs with Attorney Ferrell. **11:43 AM** A response is prepared to this question and it is delivered to the jury. The jury is brought back out to ask them if they can hear any conversation going on in the courtroom; they respond no. They are released back to the jury room to resume deliberations. **12:08 PM** The jury knocks, stating that they are taking their lunch break. **01:22 PM** The jury knocks and they resume deliberations. **02:31 PM** The jury knocks, stating that they are taking their afternoon break. **02:46 PM** The jury knocks, stating that they are resuming deliberations. **03:51 PM** The jury knocks, stating that they have another jury question. All parties are called. **04:26 PM** Court reconvenes with all parties present. Again, Attorney Whitehead is filling for Mr. Underwood. **04:30 PM** The jury is seated and given cautionary instructions Juror #5 is also asked questions. **04:34 PM** The jury is released to the jury room. DPA Ruyf does defers to the Court with regard to Juror #5. **04:34 PM** Attorney Whitehead opposed Juror #5 being excused **04:37 PM** The Court excused Juror #5 for cause. **04:38 PM** Juror #5 is brought into the courtroom and excused for cause. **04:48 PM** Case adjourns.

End Date/Time: 03/25/11 4:48 PM

Judicial Assistant/Clerk: LINDA SCHRAMM
Court Reporter KATRINA SMITH
Start Date/Time: 03/28/11 8:57 AM

March 28, 2011 09:21 AM
Court reconvenes. Parties present, DPA Jason Ruyf, D-Atty William Ferrell with/for OC-Def. Desmond Johnson, D-Atty Michael Underwood with/for IC-Def. Kevin Franklin. Jury not present. 09:21 AM The Court calls matter for the record, addresses the issue Friday, March 25, 2011 and juror issue and note, D-Atty Underwood was not present-D-Atty Richard Whitehead was present at hearing for him. 09:25 AM Mr Ferrell addresses the Court

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regarding brief contact with juror #1. 09:26 AM Mr Underwood responds. 09:27 AM Jury seated and instructed by the Court. 09:28 AM Juror #14, John R Thomas is now to deliberate with the panel. 09:29 AM The Court instructs the jury to start your deliberations over with new juror, John R Thomas. 09:31 AM The Jury excused to commence with deliberations. 09:34 AM Recess. 10:30 AM Jury knocks and takes morning break. 10:49 AM Jury back from break and return to deliberations. 12:03 PM Jury take lunch break.

End Date/Time: 03/28/11 12:00 PM

Judicial Assistant/Clerk: LINDA SCHRAMM
Court Reporter KATRINA SMITH
Start Date/Time: 03/28/11 1:30 PM

March 28, 2011 01:30 PM

OFF THE RECORD Jury return from lunch break and resume deliberations 02:35 PM Jury knock and take break. 02:54 PM Jury return to deliberations. 03:56 PM Jury knock and indicate they have a question. Question is sealed for the day and will be taken up in the morning with all parties and covering Judge Edmund Murphy present. Counsel and Department 9 notified. Jury excused for the day, one juror has doctors appointment and jury will resume deliberations at 10.30 AM. 04:10 PM Recess.

End Date/Time: 03/28/11 4:00 PM

Judicial Assistant/Clerk. LINDA SCHRAMM
Court Reporter KATRINA SMITH
Start Date/Time: 03/29/11 8:13 AM

March 29, 2011 09:05 AM

Court reconvenes. Parties present: DPA Jason Ruyf, D-Atty William Ferrel with/for OC Def. Desmond Johnson, D-Atty Michael Underwood with/for IC Def. Kevin Franklin. 09:05 AM Judge Edmund Murphy present today for recessing Judge John Hickman addresses the Court as to the jury question. 09:07 AM Mr Ruyf responds and address issue of charging

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information of the case. 09.08 AM Mr Ferrell responds, no objection taking jury question. 09:08 AM Mr Underwood responds and has no objection taking jury question. 09:08 AM Colloquy re: answering jury question. 09 09 AM The Court responds, answer provided to question form by the Court, agreed by parties. 09:09 AM Jury returning at 10:30 to deliberate, form will be given to them by judicial assistant at that time. 09.11 AM Counsel excused. Recess.
OFF THE RECORD10:33 AM Jury present. Jury question form given to jury foreman, resume deliberations. 11:59 AM Jury take lunch break.

End Date/Time: 03/29/11 12:00 PM

Judicial Assistant/Clerk: LINDA SCHRAMM
Start Date/Time: 03/29/11 1:26 PM

Court Reporter KATRINA SMITH

March 29, 2011 01:33 PM
OFF THE RECORD 01:33 PM Jury return from lunch and resume deliberations. 02:30 PM Jury knock and request to take a break. 02:50 PM Jury resume deliberations. 03:52 PM Jury knocks and indicates that they are done for today and will return tomorrow at 9:00 AM.

End Date/Time: 03/29/11 4:00 PM

Judicial Assistant/Clerk: LINDA SCHRAMM
Start Date/Time: 03/30/11 8:40 AM

Court Reporter NOT ON RECORD

March 30, 2011 09:07 AM
OFF THE RECORD 09:07 AM Jury present and resume deliberations. 10:06 AM Jury knock and request break. 10:36 AM Jury resume deliberations. 11:52 AM Jury breaks for lunch.

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vs.

FRANKLIN, KEVIN WAYNE

Cause Number 09-1-02724-4
MEMORANDUM OF JOURNAL ENTRY

Judge JOHN R HICKMAN

MINUTES OF PROCEEDING

End Date/Time: 03/30/11 11:52 AM

Judicial Assistant/Clerk. LINDA SCHRAMM
Start Date/Time: 03/30/11 1:14 PM

Court Reporter Jennifer McLeod

March 30, 2011 01:29 PM

OFF THE RECORD 01:29 PM Jury resumes deliberations 02:17 PM Jury on break. 02:35 PM Jury resumes deliberations. 03.18 PM Jury knocks and foreman indicates jury has a question, form given to the judicial assistant 03:21 PM Counsel and jail notified. 04:24 PM Court recovenes. Counsel present: DPA Jason Ruyf, D-Atty William Ferrell with/for OC Def. Desmond Johnson, D-Atty Richard Whitehead for D-Atty Michael Underwood with/for IC Def Kevin Franklin. 04:24 PM Judge Edmund Murphy present for Judge John Hickman calls the matter for the record, reads jury question for the record. 04:25 PM Mr Ruyf responds. 04:26 PM Mr Ferrell responds. 04:27 PM Mr Whitehead responds. 04:27 PM The Court responds. 04.29 PM Jury seated and the Court reads the question. 04:30 PM The Court conducts colloquy with presiding juror Thaddeus Faussett, questioned by the Court, answer no. 04:31 PM Jury excused to the jury room. 04:32 PM The Court addresses counsel. 04.32 PM Mr Ruyf responds. 04:32 PM Mr Ferrell responds. 04:32 PM Mr Whitehead responds. 04:33 PM The Court responds. 04:33 PM Mr Ferrell responds. 04:33 PM Mr Ruyf responds. 04.33 PM The Court responds. 04:34 PM Mr Ferrell responds. 04:35 PM Jury seated. 04:36 PM The Court excuses jury for the day and instruct them to return at 9:00 AM. 04:39 PM Counsel excused. 04:39 PM Recess.

End Date/Time: 03/30/11 4:39 PM

Judicial Assistant/Clerk. LINDA SCHRAMM
Start Date/Time: 03/31/11 8:01 AM

Court Reporter NOT ON RECORD

March 31, 2011 09:03 AM

JUDGE JOHN R HICKMAN Year 2011

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2
Certified By: Kevin Stock Pierce County Clerk, Washington

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs

FRANKLIN, KEVIN WAYNE

Cause Number 09-1-02724-4
MEMORANDUM OF JOURNAL ENTRY

Judge JOHN R. HICKMAN

MINUTES OF PROCEEDING

OFF THE RECORD 09:03 AM Jury present and resume deliberations. 10:18 AM Jury knocks and indicates to judicial assitant (Connie Mangus) they had some confusion as to deliberations, jury instructed to go on break. Judicial Assistant notifies Judge Murphy. 10:49 AM Jury was reminded by the judicial assistant (Linda Schramm) per the Court that the Court instructed the jury to return this morning at 9:00 am to resumes deliberations, Jury resumes deliberations. 11:28 AM Jury breaking for lunch

End Date/Time: 03/31/11 11:30 AM

Judicial Assistant/Clerk: LINDA SCHRAMM
Court Reporter KATRINA SMITH
Start Date/Time: 03/31/11 1:25 PM

March 31, 2011 01:33 PM

OFF THE RECORD 01:33 PM Jury resume deliberations. 01:52 PM Jury knocks and hands the judicial assistant a jury question. 01:52 PM Counsel and jail notified.

02:40 PM Court reconvenes. Parties present: DPA Jason Ruyf, D-Atty William Ferrell with/for OD Def. Desmond Johnson, D-Atty Richard Whitehead for D-Atty Michael Underwood with/for IC Def. Kevin Franklin. 02:40 PM Judge Edmund Murphy present for Judge John Hickman, calls the matter for the record, reads the question for the record. 02:41 PM Mr Ruyf responds. 02:42 PM Mr Ferrell responds. 02:42 PM Mr Whitehead responds. 02:43 PM The Court will provide written answer to form. Counsel do not oppose answer. 02:43 PM Form will be returned to the jury by the judicial assistant. 02:43 PM Recess. 02:46 PM Jury resume deliberations.

OFF THE RECORD 02:53 PM Jury takes break. 03:25 PM Jury resumes with deliberations. 03:56 PM Jury leaves for the day. Will return at 9:00 AM to resumes deliberations.

End Date/Time: 03/31/11 4:00 PM

JUDGE JOHN R HICKMAN Year 2011

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2
Certified By: Kevin Stock Pierce County Clerk, Washington

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs

FRANKLIN, KEVIN WAYNE

Cause Number 09-1-02724-4
MEMORANDUM OF JOURNAL ENTRY

Judge JOHN R HICKMAN

MINUTES OF PROCEEDING

Judicial Assistant/Clerk LINDA SCHRAMM
Start Date/Time: 04/01/11 8:33 AM

Court Reporter: NOT ON RECORD

April 01, 2011 09:03 AM
OFF THE RECORD 09:03 AM Jury present and resume deliberations. 10:20 AM Jury on morning break. 10:39 AM Jury resumes deliberations. 11:54 AM Jury done with deliberations for the day, juror John Gray has medical appointment this afternoon. Jury will return on Monday, April 4, 2011 at 9:00 am to resume deliberations.

End Date/Time: 04/01/11 11:54 AM

Judicial Assistant/Clerk: Connie Mangus
Start Date/Time: 04/04/11 9:06 AM

Court Reporter: Emily Dirton

April 04, 2011 09:06 AM All jurors are present and have been marked into attendance. They have been delivered all admitted exhibits and verdict forms and resume deliberations. **09:17 AM** The jury knocks with a question. All parties are called and asked to come to the courtroom **10:16 AM** This case goes on the record. Present are DPA Jason Ruyf, Attorney Bill Ferrell with his client, Desmond Johnson, and Attorney Mike Underwood, with his client Kevin Franklin. DPA Ruyf addresses the latest question. **10:19 AM** Attorney Ferrell addresses the question. **10:20 AM** Attorney Underwood addresses the question. **10:21 AM** The Court addresses the parties with regard to this question. The jury is seated **10:28 AM** The counts that the jury could not reach verdicts on are read. Mistrials are declared on those counts only. **10:31 AM** The verdicts are read. **10:37 AM** The jury is polled. **10:40 AM** The jury is thanked for their service. **10:43 AM** The jury released to the jury room. DPA Ruyf addresses the Court with regard to the sentencing guidelines and argues a no- bail holds on both defendants. Sentencings are set for April 22, 2011, at 1:30. **11:19 AM** Case adjourns.

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2
Certified By: Kevin Stock Pierce County Clerk, Washington

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs

FRANKLIN, KEVIN WAYNE

Cause Number: 09-1-02724-4
MEMORANDUM OF JOURNAL ENTRY

Judge. JOHN R. HICKMAN

MINUTES OF PROCEEDING

End Date/Time: 04/04/11 11:19 AM

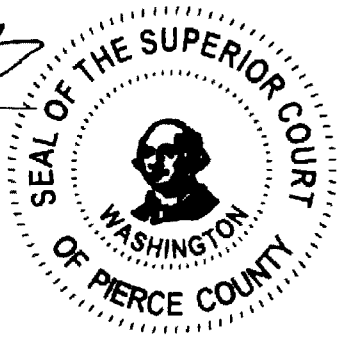
JUDGE JOHN R HICKMAN Year 2011

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 15 day of June, 2016

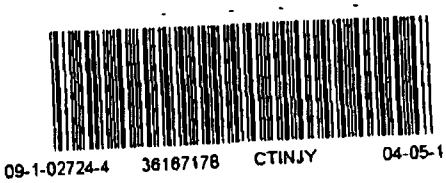
Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Jun 15, 2016 3:18 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: 40A5043D-9B14-4004-84FBA5C60ECD1BB2**.
This document contains 44 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "F"



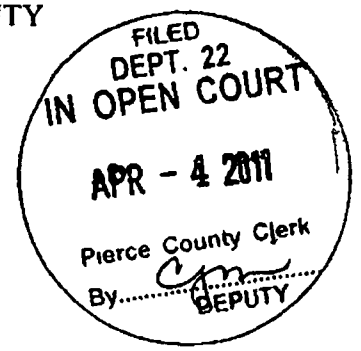
SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

KEVIN WAYNE FRANKLIN,
~~DESMOND RAY JOHNSON~~,
Defendant.

CAUSE NO. 09-1-02724-4
~~09-1-02725-2~~



COURT'S INSTRUCTIONS TO THE JURY

DATED this 24 day of March, 2011.

JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the judicial assistant and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

Each defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to any other defendant.

INSTRUCTION NO. 5

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 6

You may consider evidence that the defendant has been convicted of a crime in deciding what weight or credibility to give to the defendant's testimony.

INSTRUCTION NO. 1

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony about statements made by Jerome Kennedy to TPD Det. John Ringer and may be considered by you only for the purpose of assessing the credibility of Jerome Kennedy. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

INSTRUCTION NO. 8

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony and exhibits regarding the Jonathan Ragland homicide at 74th and Oakes Streets and may be considered by you only for the purpose of providing the immediate context of events close in both time and place to the charged crimes. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

INSTRUCTION NO. 9

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 10

A person commits the crime of drive-by shooting when he or she recklessly discharges a firearm in a manner that creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge.

INSTRUCTION NO. 11

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result or fact.

INSTRUCTION NO. 12

A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct. This inference is not binding upon you and it is for you to determine what weight, if any, such inference shall be given.

INSTRUCTION NO. 13

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 14

To convict the defendant Kevin Wayne Franklin of the crime of drive-by shooting as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice recklessly discharged a firearm;

(2) That the discharge created a substantial risk of death or serious physical injury to another person;

(3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

To convict the defendant Desmond Ray Johnson of the crime of drive-by shooting as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice recklessly discharged a firearm;

(2) That the discharge created a substantial risk of death or serious physical injury to another person;

(3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm.

INSTRUCTION NO. 17

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 16

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

INSTRUCTION NO. 19

To convict the defendant Kevin Wayne Franklin of the crime of unlawful possession of a firearm in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

To convict the defendant Desmond Ray Johnson of the crime of unlawful possession of a firearm in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant knowingly had a firearm in his possession or control,

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a firearm.

INSTRUCTION NO. 22

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 23

A defendant's intent to cause a particular harm to a particular victim "transfers" to an unintended victim, so that a defendant may be convicted of assaulting an unintended victim based on the defendant's intent to cause a particular harm to the intended victim.

INSTRUCTION NO. 24

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 25

The following definition of assault is to be used only when considering the crime of assault in the first degree as charged in Count III:

An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

INSTRUCTION NO. 26

To convict the defendant Kevin Wayne Franklin of the crime of assault in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman;

(2) That the assault was committed with a firearm;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

To convict the defendant Desmond Ray Johnson of the crime of assault in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman;

(2) That the assault was committed with a firearm

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

The defendant is charged in count III with assault in the first degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of assault in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 29

A person commits the crime of assault in the second degree when he or she assaults another with a firearm.

INSTRUCTION NO. 30

The following definition of assault is to be used only when considering the crime of assault in the second degree as charged in Count IV:

An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 31

To convict the defendant Kevin Wayne Franklin of the lesser included crime of assault in the second degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman with a firearm; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

To convict the defendant Desmond Ray Johnson of the lesser included crime of assault in the second degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman with a firearm; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 33

To convict the defendant Kevin Wayne Franklin of the crime of assault in the second degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice assaulted Jeremy Berntzen with a firearm; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 34

To convict the defendant Desmond Ray Johnson of the crime of assault in the second degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 31st day of May, 2009, the defendant or an accomplice assaulted Jeremy Berntzen with a firearm; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 35

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 36

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and the verdict forms. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of assault in the first degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank

provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C.

If you find the defendant guilty on verdict form C, do not use verdict form "C – Lesser Included Crime of Assault in the Second Degree as Charged in Count III." If you find the defendant not guilty of the crime of assault in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of assault in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form "C – Lesser Included Crime of Assault in the Second Degree as Charged in Count III" the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form "C – Lesser Included Crime of Assault in the Second Degree as Charged in Count III."

You must fill in the blank provided in each of the other verdict forms the words "not guilty" or the word "guilty," according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 31

You will also be given special verdict forms for the crimes charged in Counts I, II, III and IV. If you find the defendant not guilty of a particular charged count, do not use the special verdict form(s) for that count. If you find the defendant guilty of a particular count, you will then use the special verdict form(s) for that count. In order to answer any special verdict form "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you do not unanimously agree that the answer is "yes" then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.

INSTRUCTION NO. 38

If you find the defendant guilty as charged in Counts I, II, III and/or IV, then you must determine if the following aggravating circumstance exists:

Whether the defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership.

INSTRUCTION NO. 39

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity.

"Criminal street gang member or associate" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang.

INSTRUCTION NO. 40

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Counts III and IV.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the firearm at the time of the crime.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

Case Number: 09-1-02724-4 Date: June 15, 2016
SerialID: 87F24F31-42DF-4E72-9ABDD2AE74B7D76D
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 15 day of June, 2016

Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Jun 15, 2016 3:18 PM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: 87F24F31-42DF-4E72-9ABDD2AE74B7D76D**.
This document contains 44 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "G"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. KEVIN WAYNE FRANKLIN, DESMOND RAY JOHNSON, Defendants.	Superior Court Nos. 09-1-02724-4 09-1-02725-2 Court of Appeals No. 42027-9-II

VERBATIM TRANSCRIPT OF PROCEEDINGS
VOLUME XIV

March 24, 2011
Pierce County Courthouse
Tacoma, Washington
Before the Honorable JOHN R. HICKMAN

APPEARANCES

For the Plaintiff:	Mr. Gregory Greer Mr. Jason Ruyf
For the Defendant Franklin:	Mr. Michael Underwood
For the Defendant Johnson:	Mr. William Ferrell

Emily J. Dirton, CCR
Official Court Reporter
Department 22 Superior Court
(253) 798-6188

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VOLUME XIV
March 24, 2011

EXHIBIT

BE IT REMEMBERED that on Thursday, March 24, 2011, the above-captioned cause came on duly for hearing before the **HONORABLE JOHN R. HICKMAN**, Judge of the Superior Court in and for the County of Pierce, State of Washington; the following proceedings were had, to wit:

<<<<<< >>>>>>

THE COURT: Thank you, please be seated. Good morning, everyone. We're back on the record in regards to State of Washington v. Franklin/Johnson. We had gone over jury instructions yesterday and also discussed the fact that there might be some rebuttal testimony based on the State reviewing some phone calls that were made and exchange between Mr. Franklin and -- I can't remember her last name.

MR. RUYF: Crystal Jenkins, Your Honor.

THE COURT: Crystal Jenkins. I have received a copy of the printed-out transcript of the conversation that would appear to be between those two parties, and that the State, I assume, is interested in presenting as rebuttal testimony. And having said all of this, Mr. Greer, where are we at with the jury instructions?

MR. GREER: At about 8:30, I think, I brought the clean copies of what was corrected down here, and I assumed the Court was going to piece them together. I can do that if you would like.

THE COURT: I'm trying to get a decision done that I have to make on Friday, so I've been working on that and didn't look at the jury instructions.

MR. GREER: Your Honor, Mr. Ruyf can handle this, and I don't need to even be in the courtroom. If I can take the unciteds and piece them together, and then I'll come back down before copying them, show them to defense, make sure that we're all happy, and then go copy them. Like I say, we have two copiers. It should take about five to ten minutes to copy them.

Detective Ringer is going to be here, hopefully within about five minutes, can fill a little bit of time. All he's going to do is -- there's three or four phrases that I don't think the jury would understand --

THE COURT: Right.

MR. GREER: -- on the set, and some other things. So he'll be two minutes, just saying, you know, I'm familiar with this terminology and the culture. This is what it means. So, if I can take --

if everybody's okay with me taking the unciteds -- which I don't know why they wouldn't be. They've got copies of everything. I won't number them, but I'll put them all in what I think is logical order. They can be changed.

THE COURT: I haven't been on the bench today, so I don't know -- they're ones that I looked at yesterday?

MR. GREER: If they don't have cites, that's the ones we're looking for.

THE COURT: They just don't have a cover sheet, but I assume those are yours, Counsel.

MR. GREER: I'll compare them to the other packet to make sure everything is there. So if I can be excused, Your Honor.

THE COURT: Okay. Do you want my copies that I marked up with the changes that need to be made, or are you okay with what you have?

MR. GREER: No, I marked mine up. I'll take those upstairs, make sure everything's there, and then not number them until we're sure everything's right.

THE COURT: I think the only additional instruction was Mr. Ferrell's, and I think you've got that one where we're going take out the word "only" and put in the recaps.

MR. GREER: He had a limitation on Detective Ringer's testimony about Mr. Kennedy's statements.

THE COURT: Correct. That is the one I'm talking about.

Mr. Ruyf, I can't see Mr. Ferrell.

MR. RUYF: Sorry, Your Honor. I was purposely moved over so Mr. Greer would have his space.

THE COURT: I need to watch him.

Mr. Ferrell and Mr. Underwood, I would like to take advantage of Counsel's offer to go ahead and take the instructions per our corrections, put them in order, allow you to see them before I number them, and then we can go on the record, and I can number them on the record and make sure that they are how we want them. I have all of my notes and the instructions that we were going to make in terms of changes, so I've got -- and I'm sure you all have your notes as well, but to make sure we can get this done timely, it would save Ms. Mangus a tremendous amount of time and the Court to allow him to do that, but with always with the approval of the Court and two counsel.

MR. FERRELL: I mean, I don't have a problem with him doing it, Judge. I don't know that -- I mean, it's really up to the Court whether they're going to allow the attorney to leave the courtroom while the

jury is in, but it's up to the Court.

THE COURT: No. They have co-counsel, and that's a delegation of authority, but I just want to make sure that everything I do is on the record and with your knowledge and consent. I know some of these things may be obvious to the three of us, but they're not to your clients.

MR. FERRELL: Always better to err on the side of caution.

THE COURT: Right. Mr. Underwood.

MR. UNDERWOOD: Not a problem, Your Honor.

MR. FERRELL: One thing, Your Honor, I'm pretty jammed up today, so I will be needing a morning recess at some point to try and take care of some things.

THE COURT: How much time do you feel, Mr. Ruyf, that the State's going to need for closing argument?

MR. RUYF: Your Honor, since Mr. Greer is handling that exclusively, I couldn't speak to that. I know I've watched Mr. Greer before, and he tends to err on the side of brevity. I know that we don't have, like a protracted PowerPoint presentation or something like that. So other than in light of the Court's experience, saying somewhere in the mean, I really

can't offer any more information.

THE COURT: Mr. Ferrell?

MR. FERRELL: Umm ...

THE COURT: Let me just suggest what my time is.

MR. FERRELL: Very good, Your Honor. I'm quite sure my estimate will fit well within that parameter.

THE COURT: Well just, you know, being practical in terms of dividing this three ways, I'm thinking about 40 minutes per side.

MR. FERRELL: Yeah. I don't know that I'm going to have 40 minutes' worth, Judge. I mean, you know, obviously my client's featured less prominently in the evidence than some other people might have. So I think a little bit less to address than perhaps others.

THE COURT: I'm going to just -- we'll say 40 minutes at this point.

MR. RUYF: The only point of clarification I would ask, Your Honor, is since the State does bear the burden -- if we're getting 40 minutes per side, that we have an opportunity to provide rebuttal.

THE COURT: I will probably give you 10 minutes worth of rebuttal.

MR. RUYF: In addition to the 40?

THE COURT: In addition to the 40.

MR. RUYF: Thank you, Your Honor.

THE COURT: As time allows, I guess, is the best way to put it, but I certainly recognize that and would grant at least 10 minutes.

MR. RUYF: The only thing, obviously, Your Honor, is that at some point, Mr. Greer will be having to rebut the statements of 40 minutes' worth of two defense attorneys.

THE COURT: Counsel, I'm telling you right now what my feelings are. As I say, as time allows will be dictating it.

But we have an issue, from what I understand, in regards to some rebuttal testimony or evidence. Mr. Ruyf, you appear to be the designated attorney on this. What would you say to the Court right now?

MR. RUYF: That's correct, Your Honor. And before going specifically into the evidence, I would like to make a record that I provided the Court an e-mail last night entitled proffer. I sent that also to both defense counsel, and it wasn't intended to be a verbatim transcript. What it was was the best I could hear in the tapes that I listened to, to provide

guidance as to what exactly it is that the State proposes to play for the jury. I spoke with Mr. Underwood. I believe he's conferred with his client.

We have two ways of going about this, assuming that the Court would permit it, and that would be, one, we would call Officer Schollick in, as I referenced in the e-mail. He would lay the foundation for these jail tapes, of course, and to do so would be underscoring the fact that Mr. Franklin is, in fact, in the jail, which is in some ways unavoidable, because the recording comes on every so often to remind people that they are being recorded and that the call is from the jail. But we would have to have the officer on the stand specifically to address why it is that Mr. Franklin's calls are coming under another inmate's PIN number; conversely, why other inmates are on Mr. Franklin's PIN number, and how it was that Officer Schollick was able to triangulate these calls between defendant Franklin and Crystal Jenkins.

My understanding is, to avoid that, Mr. Underwood is going to be stipulating that these approximately two and-a-half minutes of recordings are, in fact, calls between defendant Franklin and Crystal Jenkins. And if the Court has any other questions

about the relevancy of this or what we propose to do with it, I'd be happy to answer that. If the Court would accept the stipulation, then I would cut Officer Schollick loose, who's in the hallway, and it would obviate the need for one witness.

I know that it is Mr. Greer's intention after this tape is played for the purpose of explaining a couple of phrases in these tapes that would not have necessarily been readily apparent to the common person or after Detective Ringer's gang expert testimony. For instance, in the call segment starting on 3-20-11 at 1745 minutes, "Little Monster already told me Cuz from the set." Cuz from the set would be something that we anticipate Detective Ringer would provide testimony about.

At one point Mr. Franklin says, "Respect, I don't respect nobody on everything I love. Everybody from 573rd." Detective Ringer would explain what that is.

At one point, Mr. Franklin describes somebody whose supposed to be running the operation is Mr. 3500. Detective Ringer would be expected to testify to that, as well as out of pocket, also this hood shit about checking, falling in line or getting in line.

And then, in the third phone call between 3:35 and 4:23, Crystal Jenkins is discussing a fella who is going by the name of Juice, and Mr. Franklin explains to her that he basically -- what didn't she understand. That he's Little Monster now, LM. He's got another guy in custody that he's turned into BG Monster. He's got two underneath him, and he's working on a third. In light of the gang evidence, Detective Ringer's also anticipated to come on and provide guidance as to that. I didn't put that in the initial e-mail last night at 11:00 when I sent it, because I hadn't been able to confer with Mr. Greer and didn't realize that was his intent.

So what hasn't changed is the State would only be putting on, in light of the stipulation, one rebuttal witness. We would be offering this evidence specifically as impeachment to a great majority of Mr. Franklin's testimony regarding that he's out of the life. He only keeps the tattoo of his Eastside Gangster Crip back on his iPad [sic] phone so that he can show it to other people so they know he was legit so he could help guide them out of the life. That he had turned around, that he wasn't actively involved in gangs.

There is a specific portion immediately in

the first segment where Mr. Franklin's basically referring to -- on the stand, he referred to the mother of his child as his woman. Crystal Jenkins took offense to that. At some point before Mr. Franklin indicates to Ms. Jenkins -- remember that you're being recorded, in effect. He says "I'm willing to say whatever is necessary -- excuse me, let me retract that. I'm not going to say whatever is necessary -- never mind." Then he moves on.

So the purpose of these calls, three fold, direct impeachment of a great majority of what Mr. Franklin --

THE COURT: Counsel, you -- I totally understand the purpose of the tape or this conversation and the purpose for it and the material that is attempting to be rebutted, and I haven't heard from Mr. Underwood yet. Have you got any problems with stipulating to chain of custody or do you want to have the officer come in here?

MR. UNDERWOOD: No, Your Honor. We don't have any problem stipulating to chain of custody. We stipulate that it is Mr. Franklin and Ms. Jenkins in the phone conversations.

THE COURT: I don't want -- if we're going to have Detective Ringer testify, I want it understood

and very clear that he is not to do anything in terms of putting his own slant or attempting to testify other than to explain these terms as to what, based on his expertise, he believes they mean. But I don't want him doing anything other than doing definitions. I don't want him giving his slant or his interpretation as to the overall conversation, you know, his opinion testimony as to things that I think the jury needs to decide. I would look at him as an interpreter and nothing more.

MR. RUYF: Thank you, Your Honor. I will relay that instruction to both Mr. Greer and Mr. Ringer. I didn't mean to belabor the point. My only concern was the record did not have the proffer the Court had, and I wanted the Court of Appeals, if questioned, to understand exactly what was -- what we were doing here, and to the extent that they're reviewing the record for any error whatsoever.

THE COURT: I understand and appreciate that attempt.

Mr. Ferrell, I want to include you in the conversation even though this is not your client having this phone call, but just anything that you want to put on the record based on my decision?

MR. FERRELL: No, Your Honor. My

understanding, from having spoken with Mr. Greer this morning, is that none of the material, the rebuttal material, that the State intends to present involves my client in any way. Providing that that is, in fact, the case and that no testimony will be proffered by Detective Ringer which says, you know, anything about my client, then I really don't feel like I have a dog in the fight. I don't have a position with regard to that.

THE COURT: I want him to be advised that he's not to mention Mr. Johnson's name, either directly or indirectly, because there is absolutely no reference to this gentleman implicitly or explicitly.

MR. RUYF: Yes, Your Honor. In that, I would say that there are portions of the CD where Mr. Johnson is referenced. Not in the segments that I've provided for the Court, not in the segments that I proposed to admit. At this point, I think we need to be very clear in terms of what we're seeking to admit so the record is solidified on that point. We're not offering the entire CD. The entire CD of calls, whole catalog of calls, has a number of irrelevant, prejudicial comments about the jury, about prosecutors in the case, about how various witnesses have performed on the stand. So we have eliminated any of those

calls.

The very specific points that, based on the stipulation, I'm going to move to admit at this time would be the call on March 23, 2011, beginning at 12:22 to phone number 304-6098. It has the ID of the inmate as Jeffrey Michael Barker. The call will run from 1 minute and 52 seconds on the player to 3 minutes and 2 seconds on the player. And I will stop at that point, and so I'm moving to admit that call section between 1 minute and 52 seconds and 3 minutes and 2 seconds.

MR. UNDERWOOD: Your Honor, I did listen to all these phone messages last night. I'll admit, I listened to them before Mr. Ruyf sent them to me. I think I got them at, I don't know, 11:00. I did look at them briefly last night. I've not re-listened to them, but I did take notes on these. I agree with Mr. Ruyf. He advised that what he has got here is not verbatim. And the same that I did. I didn't do verbatim; I took notes.

But in looking at this, Your Honor, my recollection is that what he's got here is a fairly accurate representation of what is contained on that day between those times.

THE COURT: It's my understanding you're

going to play the CD.

MR. RUYF: Going to publish the three segments of calls. But first -- I just wanted to make the record clear about it --

THE COURT: That's important to do. I'll grant it.

MR. RUYF: -- what's going to be admitted. Then, if the Court would, I'd describe the publishing process to the Court's preference. So the State's motion is to admit those segments from 3/23/11, between 1 minute and 52 seconds on the player, and 3 minutes and 2 seconds on the player.

THE COURT: Motion is granted.

MR. RUYF: The next call the State seeks to admit, the segment of the call is on 3/20/11. The call lists at 11:03 on that Sunday. Again, the inmate name is listed as Jeffrey Michael Barker. The call is to 304-6098. Again, that's the number that we have in evidence as Lady Monster's, Ms. Jenkins. The call will begin at 17 minutes and 45 seconds on the player, the call will end at 19 minutes and 51 seconds on the player. I move to admit that segment.

MR. UNDERWOOD: Again, Your Honor, I did listen to that segment prior to Mr. Ruyf's sending these e-mails. I did make notes. I did compare my

notes this morning with this, and even though it's not an exact text, it comports with the notes I made of this particular phone call.

THE COURT: Motion granted.

MR. RUYF: Thank you, Your Honor. And the last segment that the State would admit into evidence appears on the player at 3/19/11 at 1722, that's the Saturday. Jeffrey Michael Barker is the inmate listed. The call is again to 304-6098. The play time is 3 minutes and 35 seconds on the player to 4 minutes and 23 seconds on the player, and the State moves to admit that segment.

MR. UNDERWOOD: Just for the record, Your Honor, to be clear, I believe it's Jeffrey Michael Baker, not Barker.

Again, Your Honor, I did listen to that tape last night before I got this e-mail. I did take notes on this particular one. I do recognize it. Even though Mr. Ruyf is not verbatim, generally his notes here match the notes that I have.

THE COURT: Motion is granted.

MR. RUYF: Thank you, Your Honor. As far as procedure, if the Court would permit it, what I would request is that once the jury is seated, I'd just like a moment to make sure that we've got the appropriate

volume and everything's ready so that the jury isn't otherwise delayed. I'd ask the Court to provide the stipulation to the jury that they're about to hear three segments of telephone recording, that there is a stipulation among the parties that these calls were from the defendant Kevin Franklin to Crystal Jenkins.

THE COURT: Why don't you write that out for me?

MR. RUYF: Thank you, Your Honor.

It would also be my intent then, once I begin publishing, for the purpose of making the record to enunciate, call at this date, this time, and then to play, and stop times.

THE COURT: Okay.

MR. RUYF: I have the stipulation written out. I'll hand that to counsel. While I'm doing that, Your Honor, and Mr. Underwood, because there is a potential -- within these calls -- it's unavoidable, the announcer comes on the recording and says, this call is from the Pierce County Jail; your call may be monitored.

I'd ask the Court to make a 404(b) ruling on that finding, that the probative value of the State's rebuttal evidence exceeds the prejudicial effect to the extent that the jury is able to make out those portions

of the tape when the automatic announcer comes onto the recording.

MR. UNDERWOOD: I listened to it, Your Honor. Those do come on at times. Quite frankly -- and it may be the equipment I was using. I first started out with the fist one, I couldn't even understand because of an echo effect. I pushed buttons on my computer. It's fairly clear. I think when the jail comes on, it's kind of muffled, I think. For me, it was hard to hear, but it's there. I don't think there's much we can do about it. After we hear it, maybe we can assess that situation maybe of a limiting instruction just on the fact that he's in jail is not to be considered. It's something we can ...

THE COURT: Well, this is -- I think just to make sure everyone understands, these phone calls are generated from the jail by inmates using jail equipment. And it is made known, both prior to and during the phone call that the calls are, in fact, being recorded. I don't see any way we can sanitize the recording, especially when the person making the call is fully informed or advised when he's making this call that it's being recorded, and that he's constantly being told that it's being recorded.

And I think the probative value of these

phone calls clearly outweighs any prejudicial value, especially in light of the fact that the party knows in advance and during the call that those warnings are being given, and they continue to voluntarily continue the conversation. So I will make a formal ruling that any prejudicial value far outweighs the probative, excuse me, just the opposite. The probative value far outweighs any prejudicial value, and will allow the recordings as indicated to proceed.

MR. RUYF: Thank you, Your Honor. At this time, I'd just ask for a moment to do two things: One, inform Officer Schollick that his testimony won't be necessary this morning. He's just outside in the hallway. And then, prepare the CD for playing so that I can be very sure that no information that has not been admitted would be heard by the jury.

THE COURT: I'm going to get off the bench so you can do that outside my presence. Ms. Mangus, when they're ready, we'll proceed. Again, be sure and tell Detective Ringer my instructions as well.

MR. RUYF: I will relay the instructions, Your Honor.

MR. FERRELL: Judge, I'm going to pop down to PJ and try to take care of something. Sorry, but I, you know -- the log jam has to end sometime. It

happens to be today.

THE COURT: Just let her know if it's going to get crazy.

MR. FERRELL: Oh, I will. It won't, Judge. I've got some short stuff to take care of. Then I have a plea to do. I figured I can take the plea during morning recess.

MR. RUYF: Just to let everybody know -- when I looked outside, I did see Detective Ringer, so we shouldn't have any delay with respect to moving into our last witness.

THE COURT: Okay, thank you.

(Recess.)

THE COURT: Thank you. Please be seated.

MR. RUYF: Your Honor, two things before we get underway. The one is, I wanted to alert everybody Detective Ringer is in the courtroom. Because his purpose is going to be to interpret certain vocabulary in context used during this recording -- he's going to be an expert describing that -- it seemed appropriate that he be able to hear it. My understanding is that other than looking at the transcript so far that we have, he's not actually heard this recording. So I guess I'll pause for defense counsel to respond to that if they have any issue.

MR. UNDERWOOD: I don't really have an issue with it. I understand that's the purpose of it.

MR. FERRELL: Well, Your Honor, I think the traditional need to exclude witnesses during the pendency of a proceeding has to do with insulating them from listening to other witnesses. I don't think we're having any other live witnesses in any event. This officer -- sorry, this detective has been called to interpret the tapes, and I think it would be appropriate that he remain in the courtroom. Certainly there's no prejudice that is going to come from that.

THE COURT: I would agree. There are civil rules -- I don't know if there is a criminal rule about it, but, certainly expert witnesses, unlike civilian witnesses, are allowed in certain cases to remain in the courtroom in order to hear testimony so that they may more clearly render an opinion based on their expertise. This is clearly one of those circumstances, and, Detective, you're more than welcome to stay. Have you -- will you be able to hear?

THE WITNESS: I'll make sure I can.

THE COURT: If you want to stand closer, you're more than welcome to do so. Thank you for bringing that to Court's attention.

What is the second issue?

MR. RUYF: The second point, Your Honor, is that with our stipulation -- just since these segments have been admitted outside the presence of the jury, what I would like to add to that language is you're about to hear, you know, three segments of calls that have been admitted into evidence by stipulation of the parties so that they understand that this is, in fact, admitted evidence that they're listening to. Do you have any objection to that?

MR. UNDERWOOD: No objection to adding that language, Your Honor.

MR. RUYF: Mr. Ferrell?

MR. FERRELL: Again, no objection.

MR. RUYF: Just so everybody's prepared, the way this system works, I have to individually go into each call and then set it to the appropriate time so no inadmissible audio information comes through. So there is going to be approximately a 30- to 45-second lull between each as I'm turning sound off so nobody hears anything and getting it queued up for the next segment and playing.

THE COURT: Okay. Let's go ahead and bring the jury out.

MR. RUYF: Your Honor, even though it is a brief segment, after we conclude we would ask for a

brief recess so Mr. Greer and Mr. Ringer can confer about the Court's ruling on exactly -- I provided the information so they can discuss before Detective Ringer takes the stand.

THE COURT: So you want --

MR. RUYF: Once they play -- hear this, we'd ask for a brief recess so that Mr. Greer can confer with Detective Ringer about the Court's ruling on the testimony, and then beginning anew with Detective Ringer on the stand.

THE COURT: Well, I can just say it in open court. You mean the cautionary instructions?

MR. RUYF: No. Mr. Greer is going to be questioning Detective Ringer. Mr. Greer's just come into the courtroom. I've just quickly summarized the Court's ruling. I wanted to give him an opportunity to discuss it.

THE COURT: Okay.

(Jury enters.)

THE COURT: Thank you. Please be seated and good morning. Please take out your notepads because there is going to be some rebuttal evidence. Does the State wish to submit some rebuttal evidence, Counsel?

MR. RUYF: Yes, Your Honor, the State does. We ask the Court to read the stipulation, Your Honor.

THE COURT: Pursuant to a stipulation among the parties, you are about to hear three segments of telephone calls between the defendant, Kevin Franklin, and Crystal Jenkins. Prior to you coming out into the courtroom, those three segments have been admitted into evidence, again, by stipulation of the parties. And you're going to hear three separate segments of a conversation, and counsel will give you the time and dates as to those three separate parts of the conversation. And they'll be played for you in just a few moments. Counsel, anything further?

MR. RUYF: No, Your Honor. Thank you.

THE COURT: You may proceed with playing those segments of the conversation that have been admitted into evidence.

MR. RUYF: Thank you, Your Honor. And for the record, these are segments under State's 79.

At this time, the State will play a segment from a call made on March 23, 2011, at 12:22 in the afternoon from defendant Kevin Franklin to Crystal Johnson. [Sic.] The play time -- or, Crystal Jenkins. The play time will be 1 minute and 52 seconds to 3 minutes and 2 seconds.

(Telephone call played.)

MR. RUYF: The tape is paused at 3 minutes

and 2 seconds. While I'm setting it up, the next call will be March 20, 2011, at approximately 11:03 a.m. Call between Kevin Franklin and Crystal Jenkins. The play time will be 17 minutes and 45 seconds to 19 minutes and 51 seconds.

(Telephone call played.)

MR. RUYF: Tape is paused at 19 minutes and 51 seconds.

The last call is placed on March 19, 2011, at 1722 hours, Saturday. Call from defendant Kevin Franklin to Crystal Jenkins. The play time will be from 3 minutes and 35 seconds to 4 minutes and 23 seconds.

(Telephone call played.)

MR. RUYF: The tape is now paused at 4 minutes and 23 seconds.

That concludes the evidence, Your Honor.

THE COURT: Mr. Greer, do you intend on calling a witness?

MR. GREER: Yes, sir. Detective Ringer, as I understand it. I would request actually a very short recess.

THE COURT: Okay. Ladies and gentlemen, if you'll excuse us for just a few moments. We'll call you back in, hopefully within the next 5 to 10 minutes.

(Jury excused.)

MR. GREER: I'm confused as to what's going on. I provided the packet, Your Honor, and I think it's accurate. There was some verdict forms that were missing. And it took a little while, but if I can, I guess, step outside and figure out what's going on.

THE COURT: Outside of your presence, I indicated that the detective can testify as to interpreting the gang terminology that might be unknown to a layperson. I also instructed that he is not to mention this defendant Johnson in any way, shape, or form, either directly or indirectly, and that he was not to attempt to do any interpretation of the conversation other than to define the terms that he's familiar with as an expert in gang associations.

MR. GREER: Are there specific terms that are identified that we're to discuss and some that aren't?

THE COURT: You can talk to co-counsel. He definitely outlined -- I didn't put a "no" on anything, but I did put a "yes" on those that he highlighted on the record before counsel and myself. They were maybe -- at least four or five phrases that he wanted to have identified as put in laymen's terms.

MR. RUYF: Your Honor, it was intended to be

an illustrative sample as to opposed to what I was communicating.

THE COURT: I understand.

MR. GREER: If I can just compare his to another one.

THE COURT: I will get off the bench so you can do that outside of my presence.

(Recess.)

THE COURT: Thank you. Please be seated. Are we ready to bring the jury in?

MR. GREER: Yes, sir.

THE COURT: Okay. Before you go in, I wouldn't pack that up and take it too far. I have a very strong hunch that at some point in time, the jury may ask to have that played again. I have a strong suspicion that a lot of it was unintelligible to the jury. I've had cases, as you have, where they've requested to have a tape played again, and there's clear case law that says that that is allowable. So I'm just anticipating that they're going to ask to hear that tape again.

MR. RUYF: I will have the technology on hand, Your Honor. We have a bad speaker here, so I'm going to bring a new speaker for deliberation so that we don't have a technical problem.

THE COURT: Thank you, sir.

MR. GREER: Your Honor, lately I've had that issue in all my cases, and Mohammed -- I don't know his last name, but the IT person for the Court administration, he has been the one to load whatever device necessary to play media. In this case, of course, there is surveillance video and things like that. And we can talk about it later, but if the Court agrees and instructs him, he's not allowed to talk to the jury. He gets familiarized with what there is, and the limitations, and then he's the only one to play things.

THE COURT: Sure. I think we can work that out. I just wanted to alert the parties to the fact that having heard the tape myself, I think that could be a real issue. Let's bring the jury back in.

(Jury enters.)

THE COURT: Thank you. Please be seated. Counsel, when you're ready, you may call your next witness.

MR. GREER: The State recalls Detective Ringer.

THE COURT: If you'll raise your right hand.

///

JOHN RINGER, having been duly sworn
by the Court
testified as follows:

THE COURT: Thank you. Please be seated. You may inquire.

MR. GREER: Your Honor, did you tell him he's still under oath?

THE COURT: I just swore him in.

MR. GREER: Okay. I keep missing that somehow.

DIRECT EXAMINATION

BY MR. GREER:

Q. Detective Ringer, were you in court when the audio was played?

A. I was.

Q. About five, 10, 15 minutes ago?

A. I was.

Q. And were you able to decipher certain terminology used in the three conversations?

A. Yes, I was.

Q. I want to ask you just a few questions about some of the terms used. I just want, from the perspective of the gang culture, whether you understand -- well, let

me ask it this way. Certain words, I want to know what those words mean, or phrases.

A. Okay.

Q. Now, did you hear monikers used in the third conversation? I'm going to go in reverse order, so the 19th, last, I think, Saturday or so. Did you hear monikers, Juice, Little Monster, LM, BG Monster?

A. I did.

Q. There's phraseology -- can someone change monikers?

A. They can.

Q. And in what type of circumstances would a person change a moniker?

A. A person can change a moniker if they -- if they change gangs, if they earn the right to adopt a new moniker under somebody. In a situation -- that one there, there's LM or Little Monster. It indicates that it's gone -- the guy's gone from being called Juice to Little Monster. Basically he's earned the right to call himself Little Monster.

Q. And BG Monster?

A. It could refer to Baby Gangster Monster. It's -- again, the hierarchy like Big Monster, Little Monster, Tiny Monster, Baby Gangster Monster. There's a whole series that indicates some place in the hierarchy.

Q. And, two niggas underneath me, and I'm working on a

third, indicates what?

A. Indicates under Monster -- he's got two already under him, like Little Monster, BG Monster. He's working on adding a third one. It could be a Tiny Monster or something else.

Q. Again, reverse chronology, but it turns out the second either way you look at it.

Call on Sunday, the phrase, Little Monster already told me, cuz from the set. Cuz from the set, is that a term of art, I'll call it, in the gang culture?

A. Cuz is a term associated with Crip gangs. Crips will call other Crips cuz, cuz. A Blood will never use the term cuz. They'll use a derogatory term like crab. But cuz is a Crip term referring to another Crip gang member.

Set, again there's -- the hierarchy is, there's a Crip gang as a whole. They're Crips. Under that is numerous sets: East Side Gangster set, Youngster Gangster set -- Young Gangster Crip, Watergate Crip. Those are the individual sets, so a person's talking about their individual set.

Q. And from the set, cuz from the set?

A. In other words, a Crip gang member from my particular set.

Q. And, he got it up with Tiny K?
A. In other words, he fought with Tiny K.
Q. In context, on everything I love, everybody from 573rd. The numerology -- do -- in the gang culture, are numbers relevant to specific types of things?
A. Yes, it can be -- in many cases it's the street designation. The Rolling 60's Crips were from the 60th Street area down in California. The 23rd Street Hilltop Crips were from 23rd Street up here. A lot of times we'll see a 253, which is an area code, or 206 was an area code-specific group.
Q. And you mentioned Watergate. I think you mentioned, multiple times, Pirus as being present in Pierce County or Tacoma. Piru, what is Piru?
A. Piru is actually a Blood gang. There's a very short street down in Los Angeles called Piru Street. That's where the Blood gangs formed, and so they call themselves Pirus. Some groups call themselves Bloods, but it's almost synonymous.
Q. Watergate, also a street?
A. Watergate's an area down there. It could be around the street.
Q. He wasn't standing up for Tiny K when peoples was finding out he was snitching.

Can you -- the context -- the entire, like,

that day when he was trying to let people know he wasn't standing up for Tiny K when people was finding out he was snitching?

And is that terminology decipherable and relevant in the gang culture?

A. Certainly. Indications there are Tiny K was snitching or talking with the police, and the person that he's talking about was not standing up for him, not defending him, at that point in time.

Q. People don't understand I keep it all hundred when it comes to this hood. What does hundred mean?

A. It means I'm 100 percent, 100 percent gangster for my hood. I'm totally in.

Q. And hood is obvious?

A. Yes.

Q. Motherfuckers are telling you they are supposed to be Mr. 3500, the one running the operation. There's no way whatsoever you are supposed to be light and do something.

Have you heard the term Mr. 3500 maybe in reference to someone running an operation?

A. I haven't heard that term, no.

Q. Like I told them, nigga, we are going to get down, regardless. Get down?

A. Get down, we're going to square off and fight. We're

going to do what's necessary. It might be shoot, but it's a serious action.

Q. Tiny K is not allowed to call himself Tiny K no more. Is that self-evident? This is a moniker, and as you said earlier, people can change their monikers?

A. In this case there, it indicates that Tiny K has lost the privilege to use his moniker by the gang.

Q. What he did was out of pocket. Out of pocket?

A. Out of pocket is outside the allowed things of the gang. He stepped out of what he's allowed to do; he's out of pocket.

Q. My thing is also hood shit. They know what we are supposed to do. We got to check somebody. Now, hood shit?

A. The things --

Q. About the hood --

A. The things that the gang involves themselves in, things that are acceptable.

Q. And we got to check somebody?

A. Check means to hold somebody accountable for the things they've done. I'm going to check him. It might be a beat down. It might be a stern lecture, depending on the infraction. It might be a lot worse.

Q. So if they don't want to check nobody, that shows where a nigga's heart is at. There are rules and

regulations.

Just a further discussion of the same you just said?

A. Yeah. There's rules and regulations to the gang. If they cross those, they need to check. If people aren't up to checking or holding people responsible, it tells you where their hearts are at.

Q. In the future, it's going to be whole different story. In the near future, niggas are going to fall in line or get in line.

A. They're either going to -- they're either voluntarily going to follow the rules and regulations of the gang, or they're going to be forced to.

MR. GREER: That's all I have, Your Honor.

THE COURT: I guess, Mr. Ferrell.

MR. FERRELL: I have no cross, Your Honor.

THE COURT: Any cross?

MR. UNDERWOOD: I don't, Your Honor.

THE COURT: None from Mr. Ferrell, I think I understood you to say?

MR. FERRELL: Yeah. No questions, Judge.

THE COURT: Then you may step down. Thank you.

(Witness excused.)

MR. GREER: Your Honor, the State rests.

THE COURT: Ladies and gentlemen, at this point in time, all parties have concluded their case. We worked yesterday afternoon to get the jury instructions together. It will take us just a few minutes to present them to all parties on the record and go over them on the record. I don't expect that to take long. Then I'll have you come back, and I'll read the instructions, and we'll start closing argument.

Again, you're not to discuss this case in any way, shape, or form until you've heard my instructions and the closing arguments, so please don't start talking about this case at this point in time. I am going to allow you to take notes during closing because of the nature of this case. I think it would be helpful for you to be able to take notes, but I want you to understand that closing argument, like opening, is not evidence of the case, but just what the parties believe the evidence has proved. But I am going to allow you to take notes for closing just so you know.

Again, so if you'll excuse us. Again, I don't anticipate this to take long, and we'll have a set of instructions for you when you come back in.

(Jury excused.)

THE COURT: Thank you. Please be seated.

MR. FERRELL: These are originals, Judge.

THE COURT: Well, I'm going to number them in open court.

MR. FERRELL: Exactly.

MR. GREER: Your Honor, I did put them in an order that I felt made sense. Very close -- you know, I had to add a couple obviously, but very close to the original set the State provided.

THE COURT: Okay.

MR. FERRELL: I reviewed them. They look like they're in a decent enough order, so nothing whacky, you know.

MR. UNDERWOOD: I have had a chance to look at them also, Your Honor. They appear to be what we discussed yesterday.

THE COURT: I'm dating the cover sheet and signing it in open court. I'm going to do this in ink. If we have to change something, we'll utilize white-out. Instruction No. 1 is going to be it is your duty.

MR. FERRELL: That would seem entirely appropriate, Your Honor.

THE COURT: Which is a three-page instructions. No. 2 will be entered a plea of not guilty. No. 3 is evidence is either direct or circumstantial. No. 4 is a separate crime is charged

in each count. No. 5, the defendant is not required to testify. No. 6 is the conviction instruction as to credibility. No. 7 is the limiting instruction.

MR. RUYF: Does the Court have any problem with me setting up the Elmo while the parties are going over the instructions?

THE COURT: No.

No. 8 is another limiting instruction regarding Mr. Ragland's death. No. 9 is the definition of accomplice liability. No. 10 is the definition of drive-by shooting. No. 11 is the definition of reckless. No. 12 is the definition of discharging a firearm from a motor vehicle. No. 13 is the firearm definition. No. 14 is to convict for Mr. Franklin for Count I. Fifteen is to convict for Mr. Johnson on the drive-by shooting. No. 16 is a definition of unlawful possession of a firearm. Seventeen is the knowingly definition. Eighteen is definition of possession. Nineteen is the to convict of Count II for Mr. Franklin. Twenty is the to convict for Raymond [sic] Johnson on Count II.

MR. FERRELL: Your Honor, I hope it says Desmond Johnson.

THE COURT: Desmond Johnson. What did I say?

MR. FERRELL: You said Raymond. It's his middle name.

THE COURT: It's his middle name. Thank you.

MR. FERRELL: No problem. Just wanted to make sure.

THE COURT: Twenty-one is the definition of assault in the first degree. Twenty-two is the definition of intent. Twenty-three is the transfer instruction. Twenty-four is great bodily harm. Twenty-five is the definition of assault as it relates to count III. Twenty-six is the to convict for Mr. Franklin on Count III. Twenty-seven is to convict of Desmond Johnson regarding Count III, assault, first degree. Twenty-eight begins the process of the lesser-included crime. Twenty-nine is the definition of assault II. Thirty is the definition of assault as it relates to count IV. Thirty-one is the to convict of Mr. Franklin on the lesser included. Thirty-two is a lesser included as it relates to Mr. Johnson. Thirty-three is the to convict for Mr. Franklin on assault, second degree as indicated in Count IV. Thirty-four is the same instruction on Count IV for Mr. Johnson. Thirty-five is the instruction on unanimous verdict. Thirty-six is the deliberating

instruction, which is two pages. Thirty-seven is the special verdict instruction. Thirty-eight is a definition instruction of aggravating circumstance. Thirty-nine is the definition of street gang. Forty is a special instruction regarding the firearm.

Then we have Verdict Form A, count I, which is the drive-by shooting as to Mr. Franklin. Special Verdict Form A1, count I regarding drive-by shooting for Mr. Franklin. Verdict Form A, Count I, drive-by shooting for Mr. Johnson. Then the A1, Count 1 would be the enhancement instruction.

Verdict Form B, which is the unlawful possession of a firearm for Mr. Johnson, and then the Special Verdict Form for the unlawful possession of a firearm for Mr. Franklin. Verdict Form B, Count II is for Mr. Johnson. That is unlawful possession of a firearm in the first degree.

MR. GREER: Your Honor, I'm sorry to interrupt, but I thought I heard you say there were two Verdict Forms B for Mr. Johnson. It should be -- the way I had them is Mr. Franklin then Mr. Johnson in each case.

THE COURT: First Verdict Form B is Count II, unlawful possession of firearm for Mr. Franklin. Verdict Form -- Special Verdict Form B1, Count II, is

unlawful possession of a firearm in the first degree for Mr. Franklin which is the enhancement instruction.

MR. GREER: I may have misheard.

THE COURT: Verdict Form B, Count II is unlawful possession of a firearm, first degree for Mr. Johnson. B1, Special Verdict Form, is the unlawful possession enhancement for a firearm in the first degree for Mr. Johnson. Verdict Form C2 -- then there's Special Verdict Form C2, Count III, assault in the first degree or the lesser-included crime in the second degree enhancement for Mr. Johnson.

MR. GREER: Judge, is C first, Count III?

THE COURT: No, it's not. We need to get C first, if I'm not mistaken.

MR. GREER: Right. It should go C, lesser-included, then the two specials.

THE COURT: I think I put them back in order. Let's start again. Verdict Form C, Count III, assault in the first degree as to Mr. Franklin. Special Verdict Form for Mr. Franklin as to the crime of assault in the second degree for the lesser included. Verdict Form C1, Count III, assault in the first degree or the lesser-included crime of assault in the second degree. That would be the Special Verdict Form, C1, for Mr. Franklin in that he was armed with a

firearm. Verdict Form C, Count III, assault in the first degree would be for Mr. Johnson.

Let's see, does he have a -- yeah, I think we have a -- counsel, I'm going to seek your assistance.

MR. GREER: There should be four on Count III for each.

THE COURT: Okay. I'm going to hand you starting with Form C -- counsel, you want to join?

MR. FERRELL: Oh, yeah.

THE COURT: You have everything? What I want to do is I'll hand you this back, but I think everything before that dealt with Verdict Form Bs.

MR. GREER: Hopefully I left it on -- brought it down, and just didn't put it on the back there. I'm going to keep this separate. These are accurate, so these should follow B1. The only thing we're missing are Special Verdict Forms for this. Let me see if I have them.

Well, Your Honor, since I have to copy those -- if defense wants to come upstairs with me and check to make sure, but I need to add the Special Verdict Forms, two for each person. There's no lesser, so it's going to be a firearm and the aggravator. And I can do that pretty quickly. I'll attach it to the

back where it should go. They can come up with me if they want to or just trust me.

MR. FERRELL: I'll trust Mr. Greer while I'm doing my plea.

MR. UNDERWOOD: I don't have a problem either with Mr. Greer doing those.

MR. GREER: Then I'll copy them, Your Honor, and be back in about, hopefully, 15 to 20 minutes.

THE COURT: Ms. Mangus, we need 12, plus I'll have the original, plus one for --

MR. GREER: Thirteen. We have an alternate.

THE COURT: We'll definitely give him a copy. So that's 13 plus defense counsel. I'll be reading from the original.

MR. GREER: I'll, to be safe, make about 21 or so if we need to file different ones for the final.

MR. FERRELL: Sounds fair.

THE COURT: We just need -- you have a cited set?

MR. GREER: Those were all submitted. The only thing that's changed -- and we made a record of all the changes. So that record should reflect the number, the specific one, and how it changed. Then the corrected we'll file, you know, of course, the original, a copy, and we're there.

THE COURT: I'm going to tell the jury that this will probably take at least 15 minutes.

MS. MANGUS: They are on a break, Your Honor. I let one gentleman go out for a cigarette.

THE COURT: Just let us know if you run into any problems.

MR. GREER: I will, but I don't expect to.

THE COURT: We'll be at recess.

(Recess.)

THE COURT: Thank you, please be seated.

MR. GREER: Your Honor, I'm ready. We had some staple problems, so I'm trying to get the ones that have ugly staples changed out.

THE COURT: We'll want to give the jurors copies to read along.

THE CLERK: Right, but he's been --

THE COURT: Making sure they're together.

MR. GREER: Thirteen with reasonably good staples, the original. Your Honor, this one has a bad staple, but it's the original.

THE COURT: That's fine.

MR. GREER: I'm not sure you take staples out, so the original is loose since the verdict forms generally come back without the packet.

The other thing is, in my closing, I've got

an outline to keep me focused. I've provided copies to the defense; I provided one to the Court. I'm going to put it up here.

Your Honor, while she's getting the jury and putting the instructions out, are we planning on going straight into closing or taking a lunch break?

THE COURT: I'm going to read the instructions.

MR. GREER: Then lunch break?

THE COURT: Yeah. We can go ahead and bring them out.

(Jury enters.)

THE COURT: Please be seated. Ladies and gentlemen, you can leave your notepads in the envelopes. The Court is now going to read to you the law which you are to apply to the facts that you determine to be relevant based on the evidence that you have heard throughout this trial. I'm going to read these instructions to you. You'll be able to take the copies that you have with you back to the jury deliberation room. But because these are, as you can imagine, very important instructions, I want you to read along with me just to help you focus on what they say.

(Jury instructions read to jury.)

THE COURT: Now, it is way past noon, but I wanted to get through these instructions so we could start closing argument at 1:30. We will make sure that any typographical errors that appear on your verdict forms -- we will provide you a substitute sheet that does not have any typographical errors.

Again, you are not at a stage where you're allowed to discuss this amongst yourselves or with any third party. Don't get on any electronic devices and try to answer any questions. You're to keep an open mind throughout this process, and you are to only start to deliberate on this case when you've heard all of the closing arguments. Again, stick with the subject matter, not dealing with this case in any way, shape, or form for your discussions.

I'm going to -- we're going to have what I consider a normal lunch hour of one hour, and so we'll see you back here at 1:30. Please leave the instructions on your seat with your notes. Ms. Mangus, we'll be at recess.

(Jury excused.)

THE COURT: Please be seated. Counsel, I identified three instructions that had typographical errors, and I'm just looking for my notes where I marked them.

MR. RUYF: I believe, Your Honor, they are numbers 17, 29, 36, page 2. And page 38 -- it wasn't mentioned, but I think "exist" has to be pluralized.

THE COURT: I have 17. You said 29?

MR. RUYF: Yes, Your Honor. 36, page 2. And that would be -- page 2 would be the "of" for the "or" that the Court noted. And then my point in 38, then you must determine if the following aggravating circumstance -- and we just have "exist," singular. I think it needs to be "aggravating circumstance exists." I think the instruction was initially crafted for multiple aggravators.

THE COURT: Did you mention 19?

MR. UNDERWOOD: No, he didn't, Your Honor. I was going to bring that up. If the Court would look at No. 20.

THE COURT: Let's talk about 19 first. I thought there was a typo.

MR. RUYF: It is 19. Twenty has the proper language, Your Honor. What we have here is, after 2009, it should say the defendant knowingly had.

THE COURT: Yeah. That needs to be --

MR. RUYF: And 20 is correct; 19 requires the word "defendant."

MR. FERRELL: What was the next one?

MR. UNDERWOOD: Twenty has the proper language. That's what I was going to point out.

THE COURT: Then I think there was one more counsel mentioned that needed to be a plural versus a --

MR. RUYF: That was 38, Your Honor.

MR. FERRELL: That's the aggravating -- instead of aggravating circumstances exist, it should be aggravating circumstance exists since we're dealing with a singular aggravating circumstance.

THE COURT: Counsel, with your permission, I'll allow the State to make those corrections, provide you copies. Then we'll give those to the jurors, those corrected copies.

MR. FERRELL: We greatly appreciate the State doing that for us, Judge.

MR. UNDERWOOD: Absolutely.

THE COURT: Gentlemen, we'll see you back here at 1:30, and we'll start.

(Recess.)

THE COURT: Thank you. Please be seated. Okay, we need to deal with the new substituted jury instructions first.

Ms. Mangus, do you have the original of those uncited copied for the Court? I guess they can

be any set. Okay. Now, how would you propose we give these corrected instructions to the jury?

MR. GREER: Your Honor, all of the instructions with the verdict forms are stapled. To undo those staples, you know, and fit them all in and take things out doesn't seem to be very wise. It would take an hour. I think it would take a good bit of time, and staple them again.

So I propose that after closings, that Ms. Mangus -- in each juror's packet, take out the instruction number that corresponds to the one that they've got in their packet, just tear it out, give those to Ms. Mangus. She should have 12 of each. Once she's satisfied she has 12 of each with a little tear mark on the top, then they get the staple. If they want to unstaple them and insert them, they can. They don't have to, obviously. Between 16 and 18, there is something missing. They know it's 17 because it's numbered, so it seems to me, you know, just an administrative kind of issue. They're going to get the appropriate instructions. They're numbered, so the order -- to the extent that matters, they can put it there if they want. This would, I think, expedite things.

THE COURT: Mr. Ferrell.

MR. FERRELL: Well, Your Honor, initially I was leaning against that procedure because I don't want to call undue emphasis to any individual jury instruction which might be separated out. Of course, Mr. Greer is right. It would take us a lot of time to accomplish replacing those in a comprehensive fashion. So I guess I'm not opposed to just having them tear out the -- or us tearing out the old ones and giving them the new packet. But I'm not sure if we should wait until -- are they going to have their packets with them during closing?

THE COURT: Yeah, but they're not going to be looking at them.

MR. FERRELL: They might be when we refer to individual instructions.

THE COURT: Well, you have the right to have them look at individual instructions.

MR. FERRELL: I know. I mean, that's what I'm saying. If I get up and I say, well, okay, ladies and gentlemen, let's talk for a minute about the accomplice liability instruction, half of them are going to pick up their packet and turn to them.

THE COURT: I want to hear from Mr. Underwood. Then I have a proposal.

MR. UNDERWOOD: I agree that they should

just be able to just tear them out. You know, pull 17 out, and so we have a missing space. Give them the replacement if they want to stick them in. I think Mr. Ferrell suggested maybe we should do it before we start closing arguments. I would tend to favor that.

THE COURT: Okay. Here's what the Court's going to do. I'm going to bring the jury out. We're going to get our instructions in front of us, and I'm going to, in open court, ask them to remove the numbered instructions. After they've removed them, Ms. Mangus will collect them, and then you can hand out the corrected packets. They can insert them at their convenience. It will all be done in open court.

THE CLERK: Before closing?

THE COURT: Before closing, because again, Mr. Ferrell's correct. It's very common for both defense and the State to refer to these instructions as part of their closing.

Is 40 minutes going to be -- outside of your presence, I put the burden on Mr. Ruyf to tell me how long you were going to take. I was just adding up the time and was going to give 40, and then 10 for rebuttal.

MR. GREER: This's fine. I prefer things to be limited. Your Honor, there's 40 for each defense as

well?

THE COURT: Oh, yes.

MR. FERRELL: But I doubt -- I won't be using up 40 minutes, I don't think.

THE COURT: We'll run until we get these done. Let's bring out the jury. We'll start by tearing out these incorrect instructions.

Counsel, I'll give you at least a five-minute warning, because many counsel appreciate that.

MR. GREER: Your Honor, I also handed up a new outline. My other one, the instructions didn't match up. I had one word I changed. If you're interested in following along with that, it will be up on the screen as well. Hopefully this will keep me on track. It's 13 pages, so if I'm on page 3 and there's five minutes left, we're in trouble.

(Jury enters.)

THE COURT: Please be seated. Ladies and gentlemen, get your jury instructions in front of you. Now, we're going to provide you with corrected copies of those instructions, but since none of us have fingernails, screwdrivers or pliers that would be able to remove those staples, you're going to just rip them out. I want to go through with you the numbered

instructions that you have permission to rip out in open court on the record. I'd ask you first to remove the one-page instruction numbered 17. Just make a little pile for me because Ms. Mangus is going to come by and collect the -- okay, everybody got 17 removed?

Next, remove 19. Everybody got 19 removed?

Next, remove 29. Everybody have 29 removed?

Next, remove 36, and it's two pages.

The last instruction, please remove Instruction No. 38.

I think they've already anticipated. They're passing them down. Pass them down to the end of the row. Ms. Mangus will collect the discarded pages. Everybody passed down their discarded pages. All right, Ms. Mangus, you have permission to pass to each juror a corrected set of jury instructions.

When you get it, we'll just make sure that each packet has the numbers that we just tore out. I want you to look at your new packet and raise your hand if you don't have an instruction. Does everyone have 17? Does everyone have 19? Does everyone have 29? Does everyone have 36, two pages? And does everyone have 38?

The record should reflect that there were no hands raised, which indicates that all jurors have now

received the corrected pages and have discarded the incorrect pages. Ladies and gentlemen, when you get back into the jury room, you may substitute those as you see fit. But for now, keep them with you.

Again, I'm going to allow you to take notes, but there may be an opportunity for an attorney to refer to a particular jury instruction. Of course, if you wish, you can have them there to look at and refer to. Again, I am allowing you to take notes under the same instructions that we've had since this trial started because I think that may be helpful based on the facts of this particular case.

At this time, ladies and gentlemen, I would ask you to give your undivided attention for the next 40 minutes to Mr. Greer on behalf of the State of Washington. Mr. Greer.

MR. GREER: Thank you, Your Honor. I'm going try to get right to the point and be as brief as I can in my comments. To that extent, I've made an outline. I hope to stay on course. I've numbered the pages. There's 13 of them, so I think that will help, hopefully, with keeping your attention. You will know where I am, and you'll have some sense of how much longer I'm going to be talking to you. But, again, I hope to get right to the point and not waste time going

over things that are already understood.

First thing I want to say is it's extremely, extremely fortunate that Mr. Grossman and no one else on Cedar Street was killed or hurt by the bullets that were shot that evening. It's a neighborhood. One of the things that can't be underemphasized about a case like this is you've heard so much about gangs and shootings and violence and retribution, those kinds of things. And I believe as a society, to an extent, people become numb to it. Then you're analyzing situations with an understanding that it's acceptable for people not to talk to police, or to lie to police, or to get on the stand and basically commit perjury. All acceptable in this kind of scenario where, in fact, outside of these four walls, there are people -- the families living on Cedar Street who faced the reality on this particular evening that the characters, the type of culture that was portrayed in this case, could have certainly harmed any one of them.

Now, from this case, this incident, of course, the State has brought four charges against both defendants. They are assault in the first degree, assault in the second degree, drive-by shooting, and unlawful possession of firearm in the first degree.

As I said, I have an outline here, and what

I'm going to do is -- you see where I've got the instructions up there. I'm going to briefly touch on the instructions, the numbers, very briefly. And then I'm going to go to the only issue, as far as facts, that the State believes you have to consider and determine. That is, are these two gentlemen here accomplices in this case.

I would tell you that there will be terminology such as the principal and an accomplice, and that might be a way of thinking that, okay, the person who robbed the bank or shot the gun is the principal; the person driving the car is the accomplice to the crime of robbery or assault. In fact, even the principal is an accomplice because they help each other commit the crime. He needs to ride out of there, and the other person, you know, is helping him commit the crime by providing that ride. So in the term of accomplices, the times I'm going to be talking -- I'm not going to call it principals, I'm going to call it shooters, and accomplice to the shooter or the crimes, meaning involvement with knowledge of the criminal activity.

Now, the first instruction I want to talk about is No. 1. You don't have to turn to it. Again, I'm going to briefly just address them. The Court read

it to you. That instruction is a general instruction, and it gives a lot of general guidelines for evaluating evidence in a criminal case, things to consider, things that should not be considered. I want to dwell on one thing that should not be considered. That's this issue of sympathy. When we talked -- when you were first selected, one of the issues raised was should every single person be treated the same in the courtroom. And I believe everybody agreed that no matter whether you're an athlete or a celebrity or a homeless person or, you know, a professional, when determining whether someone has broken the law, it doesn't matter their status. It doesn't matter their character; the character's not on trial. You're not trying to determine or make an evaluation of -- are these good people or bad people that made mistakes.

That's not the issue. The issue is factual. Here's the law that the Court gives you; here are the facts. Did the person charged commit the crime; not is he a good or bad person.

Now, Number 3 is a circumstantial evidence instruction, and I'm going to give an example of circumstantial evidence that's used probably by everybody in this courthouse for the reason that it's very descriptive and accurate. You go to sleep at

night, but before you do, you look outside, and it's snowing. The next morning -- it wasn't snowing before -- you have green grass. Next morning, you wake up, your yard's -- or, you stay up all night and watch, and there's snow all over your yard. You can say with 100 percent certainty it snowed because you saw it, and that's direct evidence. It also includes, of course, smelling or any of the senses, tasting. You can say things based on your personal experience. That's direct evidence.

In contrast, you go to bed, and before you do, you watch the news and the weather man says it's going to snow tonight. You go to bed, you go to sleep, you didn't see it snow. You wake up the next morning, there's two feet of snow in your yard. You can still say within 100 percent certainty that it snowed. The point is that circumstantial evidence and direct evidence in that scenario, as well as in application to facts of this case, you can say with the same degree of certainty that it snowed. There's no difference between the strength of the weight of circumstantial and direct evidence in that example. Obviously, it varies depending on, you know, what you're dealing with and what kinds of things you're having to put together in order to come to a conclusion.

Circumstantial evidence -- I'll give you one example in this case -- the shell casings left at Cedar Street, 40-caliber, eight of them, the gun that's found at the Chevron station. There's scientific evidence that puts that together. We don't have the person shooting the gun and everybody witnessing it, and that gun never leaves anybody's sight before it's discussed in front of you. People aren't admitting to that, and the State proves it by circumstantial evidence, scientific evidence.

Number 9 is a -- I believe that's a definition of drive-by shooting. No, I'm sorry that's the accomplice liability instruction, which I'm going to come back to.

Number 10 is drive-by shooting, and without getting into too much detail of the elements, the differences between drive-by shooting type of assault, and an assault, I just want to say one general -- make one general understanding about the difference between these two crimes. A drive-by shooting is what's called a general intent crime. So you'll see that it involves a person discharging a firearm from a vehicle in a reckless manner and putting people at risk. Common sense, it's a neighborhood. You have to put somebody at risk. If a person is driving in the country by

himself, there's nobody around, and shoots the gun out of his car or her car, that's not a drive-by shooting. That is an unlawful discharge perhaps, but it's not a drive-by shooting. There has to be the risk of -- it gives you the risk here: Substantial risk of death or serious physical injury to another person. It doesn't have to occur. You just have to create a situation where that kind of thing can happen.

And this we know was created here because of not only the individuals were outside at the time, but certainly bullets penetrate windows, walls, and people get killed and seriously hurt in those scenarios.

An assault is different than a drive-by because an assault requires what's called a specific intent. Now, a specific intent means the person actually intends to do whatever the result is. You have to find in this case that one of the accomplices -- one of the four individuals in this car -- intended on assaulting another person. Intended on assaulting, not generally I-don't-care-who's-out-there, but somebody is going to get hurt, an intent, an intentional assault. Doesn't have to know the person necessarily, but in this case since the State has charged specific people, we have to prove those specific people.

Now, this is when it gets a little bit -- well, it -- the law is stretched a little bit farther than what I've just told you in this particular case because, as you noticed, we haven't charged assaults with Johnny Morris or Kiedra Lewis or Mr. Cales as the alleged victims, the people in the green car that was being shot at. You know what happened with them afterward. The State's chosen to use an intent standard of transferred intent. And when you get to the instruction, which is -- I'm going to skip over some -- Number 23. I'm going to read it: A defendant's intent to cause -- and I'm going substitute a name so it makes it easier. I'm going to say Mr. Kennedy. Mr. Kennedy's intent to cause a particular harm to Johnny Morris transfers to Mr. Grossman so that Mr. Kennedy may be convicted of assaulting Mr. Grossman based on his intent to cause a particular harm to Mr. Morris.

Now, here's an example. A person goes -- and we have this Tacoma Mall shooting. Goes in there -- again, he's got to have in that case, under this hypothetical, a specific intent to shoot somebody. It doesn't have to be a named person, but it's a crowded mall. Goes in there and starts shooting at the first people that he sees and misses and hits people

behind them. Now logically, they're just as much a victim as the people that he intended on shooting. The intent is formed. The intent is proved in my hypothetical. He's trying to hit two people, but he misses and hits unintended people. And it's nonetheless, under the legal standard, under this legal theory, the same crime. It transfers to the unintended victim.

You'll notice that in this case, Mr. Grossman is the alleged victim of the assault in the first degree count. Very simply, the State is saying that he was downrange from these individuals when the shooting happened, and he was directly in harm's way. Multiple shots hit his vehicle and penetrated into the cab of his vehicle. So you can see the comparison with the mall and the example that I gave you. That makes him the transferred intent victim when Johnny Morris' car was the one that actually, logically, these individuals were trying to hit.

That car -- I don't need to go into yet, but the evidence is going to show, of course, that this wasn't a shooting in the air. This wasn't a shooting that hit just random things. There's a bullet on the side of that green car, probably just as it's turning. We'll never know. There's bullets that are at the eye

level or below which shows you -- and the trajectory, which show you that they're shooting downrange at this moving vehicle. They're hitting things as they shoot that are -- but for those objects blocking their way or their bad shots, maybe Johnny Morris, Kiedra Lewis, Steve Cales are dead. By unintended consequence, because they don't know Mr. Grossman's even there, he could have been dead. So I think that's clear.

In contrast, Mr. Berntzen is not apparently downrange. They're in the driveway. He and his friend, as you recall, that he's bringing home because his friend's too drunk to drive. He's out, and apparently -- they're going to help him out of the car or something to that effect. When he sees the cars racing down the road, and he hears the gunfire, he turns. And you remember what he said, I'm in shock; I mean, what's going on. Fear, and shock is another term for fear. He's been put in a situation where he's afraid for himself. Now, the whole action goes by so fast, he realizes pretty quickly it's gone and he's not in fear anymore.

Go back to the intent. The intent of the actors in this case was to shoot, to harm, to assault someone, which is obviously a harm. And there's a fear element associated as well. Make them scared, chase

them, those kinds of things. Same intent. It's caught up in the intent to inflict. What I'm going to show you is great bodily harm, the assault I standard. Also in there is this assault standard that places other people in reasonable fear.

Go back to the mall situation. There's people all around that are diving for cover, that are hiding, that are locking doors. Are they not victims of this situation that this person intentionally created?

That's your decision, you know, how close to the actual actor and the intent does the person have to be before they become a victim. If somebody's down the other side of the mall around the corner and never sees anything but hears the shots, is that person a victim? Probably not. Under a legal standard, probably not a victim of that person's acts. But is the person at the kiosk who was right here when the person's firing and has to run into that store a victim for fear that he may be shot as well? Certainly life altering. And the point is, it's not just a -- oh, my gosh, that was terrible that you witnessed this. It has to be a transferred intent. What did the actor mean to do? Did he mean to put all these people in that kind of fear?

And in this case, certainly the defendants, the accomplices, meant to put everybody in that car, Johnny Morris, Cales, and Kiedra Lewis, in fear when they're firing at them. That fear that they intended transfers to Mr. Berntzen, but he's not in the line of fire such that he could be a victim, so to speak, a transferred intent victim, of this assault I standard.

Now, I want to switch to just using the assault I as the example, but it's the same with all these what's called to-convict instructions elements. You're going see in your packet -- with each, there's definitions. There's a crime, for instance, of assault in the first degree. It says in one paragraph this is what it is. Then it breaks it down and gives you a few paragraphs of definitions of various elements. These are the elements. And they're on what's called -- we call to-convict instruction. So you see the first two words are to convict. This is Number 26. It says "To convict the defendant, Kevin Wayne Franklin, of the crime of assault in the first degree."

Now remember, the first thing I asked an individual in jury selection was, if you're chosen to be on this jury, how important would it be for you to return a verdict that represents the truth about what happened. Everybody said, that's what we're here for.

That's justice, that's our system. You can't get a correct decision unless you get the truth about what happened.

Well, that's not exactly accurate. It's certainly in principle and whatever everybody meant, of course, we all agree with. But, in reality, this is the truth you have to decide. This is what you're here for is the truth of the elements, the truth of the charges as the Court read.

So in this to convict, it says, under No. 1, on the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman. You have to find the truth of that beyond a reasonable doubt. If in any one of these elements, you can't come to a truth that was proved, then it's not guilty. You're going to have doubts about, especially in this case, certain aspects of what happened. Who told the truth on the stand. I mean, that's going to be a tough one for you. Who was telling the truth out there when they were talking to law enforcement, and what parts of what they were saying were true? What parts were to protect themselves from criminal liability; what parts were to protect others?

Those kinds of issues, you know, unfortunately, but certainly expected, are what this

process is all about. That's your job. You're the fact-finders to determine what's true. Well, thankfully, you don't just have to go by what people say. You go by other evidence, of course, physical evidence, circumstantial and direct.

Now, there's one instruction that the State believes sums up this case. It's actually a paragraph. It's a definition, and it's Number 39. It says criminal street gang, member or associate means any person who actively participates in any criminal street gang and who intentionally promotes, furthers or assists in any criminal act by the criminal street gang.

That, in a nutshell, is what these two individuals, either as a member of a gang or an associate of a gang -- that's what this is all about. When I transfer right now to talk about accomplice liability, that instruction tells you that Mr. Franklin who, despite what he said on the stand, that he's out of the gang life since he was released from prison, that he's turned his life around. You heard his conversations just two, three days ago where he's talking about recruiting: Little Monster, Baby G Monster, Baby Gangster, and he's got one more. And the kinds of things that when he's out there again, he's

going to bring people in line. He obviously is not credible on the issue of being out of the gang life. You can't judge a book by its cover. You can't listen to someone and look at them say and, oh, look at how they look; they must be telling the truth.

Portia Steverson, I never ever said -- filed a false report about the stolen car, and Conrad Evans, my boyfriend, didn't tell me to. Conrad Evans on the stand, yeah, I told her to report the car stolen, you know. And up until that point, what was your impression of her? And if you believed she wasn't telling the truth -- and logically considering the time sequence I'm going to talk about -- she wasn't.

Now, two tremendously important legal concepts. One is the accomplice liability. The instruction says that a person must have knowledge of the crime in order to be a accomplice, an accomplice. So if you know hypothetically a person's going to rob a bank and you participate in the robbery and you don't know that the car is stolen that the person is driving and you don't know that the gun the person might use is stolen, other issues like that, well, you can only be held accountable for knowledge of the crime which in this case, this hypothetical, is the robbery. That's your knowledge. And so in order to be an accomplice,

the first thing you have to have is knowledge of the crime.

This is the most important aspect, though, in this case of accomplice liability. The crime is assault, not assault first degree, not assault second degree or third degree, or fourth degree, an assault. In the robbery example, the person goes in to rob, and you don't know the person has a gun. You think it's going to be a note and they're going to fake it or whatever, but they actually produce a gun. And you claim later I didn't know he had a gun, which raises it to a different level maybe. So it's -- I'm only guilty of robbery in the second degree. No, under the law, if the crime, which is robbery -- you participate knowingly in that crime, the other person, the primary, the other accomplice -- you're as guilty as whatever degree ends up happening.

So in this case if, hypothetically, Mr. Johnson in the backseat fires a .38 in the air into that RV, Mr. Kennedy fires downrange with the .40-caliber and he's intending to hit, they're both involved in assaults. And they both enter that car, drive down that street knowing that an assault's going to take place.

Mr. Franklin, sitting in the seat beside

Mr. Johnson, he knows about the assault, and he's willing to participate if needed. This is when the gang issue and the associated gang issue is going to come up as well. If he's there willing to participate with knowledge of the crime and encouraging by his mere presence, he's just as guilty as the rest of them whether he fires a shot, whether he drives the car. You're going to see that instruction. It's very important that you understand this, because assault first degree has what's called lesser-includeds. When you commit an assault first degree, you automatically commit an assault second degree. If a person is trying to shoot somebody and cause them great harm, then they're also, as I said, causing them fear logically. A misdemeanor assault is just an offensive touching. It's based -- some parts of the distinction are how much harm was actually caused. So you can see it's an umbrella that starts at the highest with the assault 1, but the others are underneath that umbrella. So if a person commits assault I, they're committing these other ones by definition. The unit, again, is assault.

You also have to wipe away the concept that because Mr. Kennedy and Mr. Evans took the stand and said they both pled guilty to assault first degree as a result of this case, these individuals have a right to

their trial. So you can't take that as a proven fact that the highest level is first degree, and then now all you consider is did they in some way know about the crime and be willing to help at a minimum.

THE COURT: You have 15 minutes, Counsel.

MR. GREER: Thank you, Your Honor.

You have to make a decision independent of their statements. You have to look at the evidence which will corroborate what they said. They're not -- in the State's mind based on the evidence, that part is accurate.

Now, since I don't have a whole lot of time to go through my outline, again the fortunate part of this is -- I lost a copy or -- I'm not sure. The fortunate part is, as I said, the most important thing is up front. And then what I want to do is just talk about those things which prove accomplice liability.

So, relevant facts. I've separated them into four areas: Relevant facts, physical evidence, defendant's statements, and circumstantial evidence. So, I'm going to go through this quickly.

You know Johnny Morris, Kennedy, Hudson get in this fight at the 7-Eleven. I'll actually go through this real quickly. They get in a fight at 7-Eleven. That starts this whole thing. It 's a gang

fight. There's multiple members of both sides. They're fighting, not amongst each other. They're separated out, YGC and EGC, and they're fighting. Mr. Kennedy gets either knocked out, hit, and gets his necklace stolen. The rest of the week, he gets taunted by Johnny Morris. You want your necklace back, you either fight me for it or pay me for it. You can imagine on the streets in the gang world, that's a pretty aggressive taunt.

Now, take it forward to the evening in question. It's a relevant fact that it is Johnny Morris' birthday because Johnny Morris is a known YGC, and he's at 54th Street logically with other YGCs. And if you're going to find him and you're going to get involved in a shooting, a retaliation that, as Detective Ringer says, will bring you street credibility and is required under the rules of the street, you're going to find him there.

What time do these four individuals get together? Are they there hanging out all day together, and do they really know each other that well? Why would these disparate people that apparently have no real connection -- according to any statement they've ever made -- with each other? Why are they together this evening? Why are they called at different

locations to all come to The Friendly Duck or why does one person pick them all up in the white Explorer and then end up at The Friendly Duck at midnight, no less? Because Mr. Kennedy wants retribution, and gangs work in numbers. He's not going to go out on his own and shoot. That's not what it's about. The tiniest guy can be the toughest gang member because guns are in play. That's what this culture is about. Tough guys -- take away the uniform, get away the gun, maybe it's a fair fight -- don't go near it because they might have a gun.

Conrad Evans is the driver willingly, knowingly. Kennedy is there with a gun. One of these two individuals has the other gun. Mr. Franklin is an EGC. He's got a tattoo that big on his back. He's got Eastside on his neck. He's got all sorts of Crip signals on him, and he's got a bandana folded up in his back, which means this is time for action. Mr. Kennedy is -- he says he's an EGC; he is an EGC. Who brought the guns, logically or reasonably? Those two guys.

Now, get in the car. That's when our time comes in. What does the defendant, Mr. Franklin, say at 1:37 to Lady Monster? I'm going to go give somebody the blues. Did the incident happened the night before or some other night with a car getting broken into?

Maybe. That just adds to the reason to go after the YGCs. Again, it doesn't have to be a specific person, any YGC. It just so happens he knows somebody that has a specific beef with a specific YGC. Come along, we'll both accomplish our retribution together. 1:42, curiously enough five minutes or so after that text, they're in a car headed to the 54th Street pub where Curtis Hudson, Kyle Ragland talk to him and tell him who's here. They're here. They get there, they're first seen on camera about 1:50. They're last seen on the camera at about 2:03, and first shots are heard here.

Now, put it in common sense terms. I'm actually putting this aside because my timing's messed up. So I'm going to put that aside, my outline.

Does it make any sense that the individuals in that car didn't know what was going to happen? Mr. Johnson, sitting in the right side, of course. Does it make sense that he didn't know what was going to happen? They're at The Friendly Duck together. They're riding around in that car without going inside the 54th Street bar. They line up behind their target. They get rid of a car that could have potentially interfered, and they go after it. Within a couple minutes they're shooting, and guess what? It's not one

gun shooting, it's two, which leads you to understand it's a plan. They're shooting at the same time. If you recall, every witness said those shots are not separated by time. Both of those individuals are shooting.

Now, if Mr. Kennedy is the one who had the idea to shoot, and grabbed his gun out of the front window -- which, by the way, we've got pictures when the car was at the Chevron. The front window is all the way down. He's shooting out that window. The person in the backseat had the same exact idea at the same exact time? They're talking. Logically, Mr. Franklin's on the wrong side of the car. All the ballistic evidence, all the results of the gunfire is on the right side of the road. The trajectory is down this way, into the back of that RV. Not sideways, into the back of the RV, through the rear brake, and into that vehicle, the side of the green vehicle. The side angles at the vehicle that Grossman is facing toward. They're going at that angle. The shots came from the right side. Mr. Franklin handed Mr. Johnson the gun because he happened to be on the side that the shooting had to happen, and it had to happen right now. He knew what was going to happen, Mr. Johnson -- and he was there as an observer; he didn't have the beef. He

doesn't apparently have the history of the others in the car, but he was there willingly. He associates with these individuals.

And what other proof do you have that Mr. Johnson's the shooter? 2:05 -- 2:03, the first calls come in. Remember, you have an officer at the 7-Eleven who hears the shots. 911 tape, that's the first calls that come in. 2:05 is when Madre Combs is at the Chevron. 2:06:50-something is when the white Explorer shows up. When the Explorer shows up, Mr. Franklin's not drunk. You can see a picture in there of him walking. You've seen the video. Those girls that walked by, he's checking them out. He's as far from blacked out as any person can be, and he beelines it for Mr. Combs' vehicle. Those guys' feet are out the door before the vehicle stops. Mr. Combs was at those pumps waiting, and you saw that. He was waiting. He never made one attempt to get gas. He's waiting on these guys, and they called him earlier. He was at 54th Street. They were there for 10-plus minutes talking. And he left, and he waited at the Chevron at 74th and Hosmer. And they went straight there with tires that shouldn't even be travelled on, but they made it there because that's where their ride was. And one of the witnesses said they called him

because they needed a ride.

Okay, then, where did the guns go? If Mr. Kennedy's shooting two guns like a cowboy with reins in his teeth, one out the side and one out the sunroof -- which makes no sense -- why does he only take one gun out when he goes and gets into the other car, and who takes the second gun? Not only the second gun, but who takes this little bag that has five fresh .38-caliber bullets in it and a holster and a glove and spent casings? Mr. Johnson does. Not Mr. Evans, not Mr. Franklin, the person holding the gun, and he hid them.

Then every single one of these guys did not tell the truth to law enforcement in some respect or another: About who they knew, about how long they knew them, about where they'd been, about when they got picked up, who they were with that evening. You have to base your decision on the evidence.

One other significant time is, of course, when Portia Steverson calls and says the vehicle's been stolen. Through the evidence -- I'm sure I don't have to make the point. I'm sure you understood it. She had to have been told at some point before to do that, because it makes no sense if police are already there to report the vehicle stolen. The idea is Madre Combs

is going to drive them away from this crime. That's the alibi. The vehicle's going to be left there, and those who allegedly did it -- or those ghosts that they're going to blame it on, they can't be found. There's no fingerprints. You see one glove that was collected. There's another one in the picture from the car, which also makes you think they're holding the guns with the gloves. So there's no fingerprints, but in any event, there's gloves there as well.

It's planned. The vehicle's left there, and they're going to pin it on people, unknown people. They were going to get away with Madre Combs, but it didn't work. All four of them went to Madre Combs' vehicle. Two got in, police cars roll by, the other two go oops, go the other way. They have all the evidence with them, everything: The guns, the ammunition, the holster, one glove, the spent casings. Everything went with them. They just got interrupted by law enforcement. They're all equally guilty.

Now, I'm going to go to my very last page because I probably have a few minutes, that's all, left.

In order to prove crimes, in order to logically make sense of things, the bottom of the circumstantial evidence aspect of this, what's involved

in assessing, you know, whether a person committed a certain crime. You can think of any crime. Well, you've got to have, usually, a motive. Crimes don't occur in vacuum. Somebody has a reason of some sort, whether it's rational or otherwise, to commit a crime. We have that in this case. Mr. Kennedy and Mr. Franklin both had a motive to involve themselves in a retaliation against another gang.

What else? A plan. Certainly they had a plan, and you can see it. It took about two, three weeks to lay it out, but you can see it. Opportunity, they had the opportunity, the plan. You know also that in their world, nobody's going to report, nobody's going to say anything. They just need to get away from the police, not the victims and the witnesses. They just need to get away from the police.

Sophistication, Mr. Johnson had the wherewithal to grab all that stuff, and he personally admitted to law enforcement that he took it, not because somebody else had it, and not said -- told some story about who shot it. But because the gun was on the floor and I thought I'd be in trouble, so I took it. That's what he said.

Sophistication, why allow in your mind individuals of their age to get away, when you analyze

this case, with that type of activity? They're virtually adults. You know, they're young. There's no doubt about it, but they're adults.

Look at the degree of sophistication displayed in this case. Franklin, "I got all my tattoos in prison." Really? SBC didn't mean Santana Block Crips. Oh, that's South Beach, South-Something Crips. Smooth, answer for everything.

Now, what does he say? Nigga this, nigga that, I'm going to check them, they need to be checked, Kennedy's been snitching, we're going to check him, homie on the outside, homie from Bremerton, some of my two new homies, my third homie.

You know, the sophistication, not just shown in the courtroom waiting, you know, and understanding the consequences potentially if this jury convicts, but at the time a police officer's confronting them. They're not scared of police officers there. They just shot at a whole bunch of people. They've got stories.

THE COURT: You have five minutes, Counsel.

MR. GREER: Five, Your Honor?

THE COURT: Yes.

MR. GREER: I don't think I'll take all that.

The timeline I mentioned, and then the last

thing I want to say is this common sense and big picture again. I said it at least twice now.

In this case involving gang activity, again, it's easy to think, okay, discount this, discount that because of this snitch factor, because of the covering for other people, all of that kind of thing. These are people. Underneath it all, underneath the tattoos, underneath the attitude they're just people. You know, like you, like me, but they've chosen to become these characters. The emotions, motivations, the designs, the ability to lie or not, it's a little bit different level than maybe the average person, but what's behind it is the same. Why does a person not tell the truth? Because they have something to hide.

Mr. Johnson didn't take that gun because he just happened to be there and he thought he'd be in trouble. Mr. Johnson knew the others in the car and very easily -- because he chose to talk to law enforcement -- could have told them what happened, but he had something to hide. He wasn't just covering, he personally was involved.

Mr. Franklin, but for the position in the vehicle, he's the shooter. He certainly had knowledge, he certainly had motive. Again, it's just circumstance that keeps him from being the one that ordinarily you

call the principal.

This concept of truth -- I usually save this, but I'm going to get it out now since I do have maybe one or two more minutes, and I can save a little time in what's called rebuttal.

Beyond a reasonable doubt, you come in here, you know nothing about the case. Now you do. The definition says, when you have an abiding belief in the truth of the charge, you're convinced beyond a reasonable doubt. If you remember, I asked those of you that have been on a jury before, as you sit here today and look back on that case or those cases, are you still satisfied in the truth of that decision? Despite whatever doubts or issues that came up, do you still believe you got it right based on the standard, based on the facts? Everyone said yes. Doesn't matter what the answer is, but the verdict -- but everyone said yes. That's what it means. You have to get there. You have to consider this case and despite whatever issues, you can't actually come to 100 percent resolution on.

The elements, when you're thinking of those elements and discussing the elements, has the State proved that the defendant -- whichever one you're talking about -- knew about the crime, participated at

least as a willing participant. Whether he actually affirmatively did something or not, was he willing to? If you're convinced -- and when you get to that point despite these other issues, two weeks from now, two years from now, eight years from now, when you're back here being asked to be on a jury again, do you still come to that same conclusion, you're convinced beyond a reasonable doubt.

And the State firmly asserts that based on the evidence in this case, these defendants are guilty of the crimes that have been brought. Thank you.

THE COURT: Ladies and gentlemen of the jury, I'm going to continue with one more closing. And after Mr. Ferrell, we'll take a brief recess, and we'll conclude with Mr. Underwood. Does that meet with your schedule or would you prefer a break now? There being no leaders among you, we'll go ahead and continue, but if there's someone who wants a break now, then let's do it.

MR. FERRELL: I think somebody does want a break now, Judge.

THE COURT: I told you I would accommodate you, so don't feel bad about it, but we're going to have strict time lines on this. I will give you 10 minutes on this, and then we'll be back in action.

(Recess.)

THE COURT: Thank you. Please be seated. Go ahead and bring out the jury.

(Jury enters.)

THE COURT: Folks, please be seated.

Ladies and gentlemen, I'd ask you to give your undivided attention to Mr. Ferrell on behalf of his client, Mr. Johnson.

MR. FERRELL: Thank you, Your Honor. Ladies and gentlemen, first of all, I want to thank you for your patience. The system depends on folks who are willing to take time out of their busy schedules to come in and participate in this process. You guys have done a great job. You've made it here. I know some of you have been ill. Some of you have missed work. We really appreciate -- and I think I speak for all of us when I say we really appreciate you guys showing up.

Now, I'm going to go ahead and use Mr. Greer's hypothetical example -- and that was the Tacoma Mall shooter -- to illustrate a few of my points.

The first thing I want to talk about is the accomplice liability instruction. That's Instruction No. 9, I believe it is. You guys don't have to follow along. You can if you want; it's up to you.

I think to some degree Mr. Greer is correct in his assertion that this case, at least to some degree, turns on this accomplice liability instruction. So in the Tacoma Mall hypothetical, the Tacoma Mall shooter on the fateful day calls me up and says, hey, let's go over to the -- let's go to the mall this afternoon. I say, great, great, swing by and pick me up. He shows up about 1:00. I hop in. We go driving over to the mall. We walk in. All of sudden, boom, boom, boom, boom, boom, the guy starts shooting. Well, I went over there with him. I went in the mall with him. Does that make me an accomplice?

I want you to consider this, ladies and gentlemen. A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, that person either solicits, commands, encourages or requests another person to commit the crime, okay, aids or agrees to aid another person in the planning or committing of the crime.

So the first thing that I think is important about that is that accomplice liability is prospective, okay. In other words, the acts that make you an accomplice have to be done prior to the crime or at the time of the commission of the crime in some way, okay.

It can't be a deal where, you know, afterwards, me and him hop in our car and drive away or, you know, that kind of thing. There's a different crime that covers that after-the-fact sort of accomplice. The accomplice liability that makes you liable for the commission of the crime that the principal is charged with -- again, we're using these "principal" and "accomplice" words. But the principal is the person that does it. The accomplice is sort of the person that helps them do it, okay. That has to be done prospectively, okay.

So to bring it around to these facts, you cannot base accomplice liability on the fact that Desmond Johnson may or may not have taken the gun and hid it in the store. That happened after the crime, okay. It's very important. I want you to keep that in mind.

Now, let me tweak the hypothetical a little bit and say that the Tacoma Mall shooter calls me up and says, hey, I want to go to the mall, but, you know, my car is out of gas, and I, you know, don't want to have to go to the gas station, get a can and bring it back, so can you come by and pick me up?

Sure, sure. I swing buy, pick him up. We get over to the mall, boom, boom, boom, boom, boom, okay. Question is, am I now an accomplice? I mean, I

actually picked the guy up and took him to the mall where the crime occurred, okay. But remember, you have to act with knowledge that it will promote or facilitate the commission of the crime, okay.

Now let's talk about this situation. Mr. Evans, Mr. Evans who is Mr. Johnson's friend, okay. He testified that they've known each other for ten to 15 years. They met as young teenagers, okay. They grew up in the same neighborhood. Now, you remember Detective Ringer talked about sort of the culture in some of these neighborhoods, right? You go to these schools. You grow up with these people. These are your friends. Little kids have friends. Later on, people become involved in whatever they become involved in. That doesn't necessarily mean that all your friends are involved in it. That doesn't necessarily mean that all your friends are just not going to hang out with you anymore.

So what happens on the fateful night, on May 30th? Well, Mr. Evans calls up Mr. Johnson, they're gonna -- he says, hey, you want to go out? Now Mr. Greer makes something out of -- they went out at midnight. Well, I remember being young, and there are a few nights that I went out at midnight, and I think that, you know, common sense tells us that people do

this. Not just people who are intent on committing crimes, not just people involved in gangs, but people go out, sometimes late, right? It makes sense. It's not extraordinary. It's not an extreme stretch of logic.

He comes over, and he picks Mr. Johnson up. They go over to The Friendly Duck. They have a couple of drinks. Well, someone other than Mr. Johnson gets a call about some folks being over at 54th Street Sports Bar. So remembering that Mr. Johnson -- now, it's getting later. I mean, it's darn near closing time at this point, well after 1:00. Mr. Johnson has not brought his own car, he's riding with these guys. They go out, they pile in. They go over to the 54th Street Sports Bar. Well, what time is it? 1:42, 1:50 in the morning. You heard Mr. Cales, who works there, testify that they start closing things down there a little bit early is what I think we may have heard referred to as bar time, right.

Bars have a specific time they got to stop serving alcohol. I always thought that folks who work in bars want to start getting that cleaned up a little bit early so they can get out of there and get home.

So they are already starting to let out over at the 54th Street Sports Bar. So I don't think it's

unusual that they wouldn't necessarily go in. Mr. Evans testified that they were there for the let-out to see, to be seen, pick up girls, that kind of thing, okay.

So far you have no information in this case that would lead you to believe that Mr. Johnson -- and again, in the words of the accomplice liability instruction -- acted with knowledge that anything he had done would promote or facilitate the commission of the crime of the assault that's coming down the pike, okay. We're here to make our decisions based on evidence and reasonable inferences, okay. We're not here to speculate about what might have been said in that car unless it is a reasonable inference. I would submit to you there's nothing that happened that would raise a reasonable inference that Mr. Johnson knew what was going on that night.

They get out, they go southbound in the alley. You saw the diagram. They get down to 56th Street. It's left and a left, and they're on Cedar, and shooting breaks out. I think the evidence is pretty clear that Mr. Kennedy, who you saw testify, leans out of that front passenger window notwithstanding the fact he said it didn't roll down -- it's pretty clear -- and he starts plugging away with

that .40-caliber.

Now, Mr. Greer says that Mr. Johnson then leans out of the back window and starts shooting the .38. He says that they recover fresh shells, but that can't be because we all heard the testimony of the firearms expert that you cannot differentiate between shells. You don't know when they were fired. I asked the specific question, if I had a .38, and I went out to the range one Sunday and shot two shots, tucked everything away, came back a week later, two weeks later, whatever, fired the rest of them and presented them to a firearms expert, would they be able to differentiate? Would they be able to say, no, you fired two this day and the rest of them another day? No, they wouldn't.

We do know that the .38 was fired because there was a round from that .38 lodged in the RV that was parked on Cedar Street between 54th and -- or 56th and 54th. There's no question that that gun was fired. And it's only logical that it was fired that night.

The question you have to ask yourself, number one, is, who fired it, okay. And the secondary question you have to ask yourself is why did they fire it. In the first instance, there is evidence that at the Chevron, Mr. Johnson got out of the rear passenger

side. That's where the State is alleging the .38 was fired from. I'm going to talk a little bit more about that in a second and why that might not be the case.

Notwithstanding that, there's also evidence that people moved around in that car. There's evidence that when Mr. Johnson got picked up, he got in the other side. He got in the rear driver's side of the vehicle, okay. I don't know if people moved around in that car. Certainly it was possible. We're talking about a large SUV with bench seats. I mean, it's not a mystery that somebody could slide over and people could move around inside of that car.

But I would submit that if you're driving down the street and you want to shoot at a car that's in front of you, it's a really lousy idea to shoot out of the front and back windows on the same side of the car. So I'm leaning out of the front window, bang, bang, bang. A guy leans out of the back window. Unless he's very careful about where he's shooting, he's going to hit me in the back or in the head. At the very least there's going to be some powder burns because we're talking about sitting here and sitting here. What is my arm's length out of that unless I'm doing something like this. It doesn't make sense; it doesn't make sense. That's a great way for somebody to

get killed inside your own car. It's not really a great way to do a drive-by, though.

Now, the State made a great deal out of the fact that there's evidence that Mr. Johnson got rid of that gun. But I ask you to consider this, ladies and gentlemen -- and I think you heard lots of testimony about how people felt after this series of events. They were scared; they were freaked out. Now, Mr. Johnson, right, who doesn't have any gang tattoos, who didn't have a rag, a bandana, who wasn't flamed out, as we say, in the colors of a particular gang, right, and whose nickname is Solo, okay. What's solo mean? It means alone. He is not with, alright. Kind of a strange name for somebody who's in a gang supposedly.

There is no indication that Desmond Johnson belonged to a gang or was affiliated with a gang except for a very small minority of the contacts in the contact list on his cell phone. Look at that when you get back there. All kinds of names in there. Businesses, people, some of them nicknames, some of them nicknames that don't have anything to do with gangs. There's a few, though, that no doubt have some kind of gang affiliation. Why is that so odd, though? Mr. Johnson has friends who are involved in gangs.

There's no doubt about that, but can we expect it to be any different? Should we predicate liability in a criminal case on that? That's for you to decide, but I don't think that we should. There is such a dearth of evidence that Mr. Johnson is involved in a gang, especially in comparison to the other evidence that we heard here in this trial, that you should not find that he is a member of a criminal street gang. You cannot.

Now, Mr. Greer also made much of the police statements that were given in this case, but I want you to recall that the detective testified that Mr. Johnson, as compared to everybody else, was very cooperative, right? We're talking about a continuum here. Mr. Johnson did not talk about what happened on Cedar Street. He readily admitted he was the guy that took the gun into the store, the .38. He 'fessed up to what he did, and I think there's a good reason for that.

You all sat here and saw Mr. Kennedy testify. How would you feel if you just watched Mr. Kennedy unload a clip of eight, perhaps 10, rounds, and he's standing with that .40-caliber in his hand. Scary guy? I don't know. Freak you out, make you think twice maybe about ratting him out to the police? I think it might. Do you want to be the guy that

crosses people like that? I'm not sure.

I want to talk for just another minute. How are we doing, Judge?

THE COURT: You're fine.

MR. FERRELL: Okay. I just want to talk to you for a couple minutes about some of the instructions. Instruction number one tells you a couple of things. Number one, that instruction stresses the importance of following the remaining instructions, okay. We all agreed when I asked questions during voir dire -- we talked about all of that -- that we were going to follow the instructions as given to you by the Court. That's what we lawyers call the law of the case, okay. It's actually based on the law of the State, but we use jury instructions, not statutes. We should all be happy for that. As difficult as the jury instructions are to follow, I promise you that the statutes are more so.

All parties are entitled to the benefit of all evidence, no matter who introduced it, okay. So you shouldn't be back there saying, well, you know -- and for a couple of reasons, you shouldn't be back there saying, well, Ferrell didn't put on a case, so I guess there's no real evidence to consider. I'm entitled, my client is entitled, to the benefit of all

the evidence no matter who introduced it. The State, Mr. Underwood for his client. We're all entitled to the benefit of that evidence.

Now you've got some limiting instructions as well. Limiting instructions are the Court essentially telling you that there's only certain purposes that you can use specific pieces of evidence for, okay. It says two important things, okay. Let me just pull them out since I still seem to have a little time left.

THE COURT: Counsel, you've only used half your time so far.

MR. FERRELL: Very good, that's nice. Mr. Greer's time seemed to go by very quickly, Your Honor.

Okay, certain evidence has been admitted -- and I'm just looking at No. 7; there's a couple of them. Certain evidence has been admitted in this case for only a limited purpose. In this case, it has to do with the testimony by Detective Ringer about statements that Jerome Kennedy made to him, okay. You're instructed that those can only be considered for, again, the limited purpose of assessing the credibility of Jerome Kennedy. You can't use them for any other purpose, okay. Moreover, you can't even discuss them for another purpose in your deliberations, okay. It's

very important. It may not make a lot of sense, but the fact of the matter is that the way we craft trials in our system, you're only allowed to consider certain things, and you're not allowed to consider other things, okay. And lots of minds that are larger than mine have thought about these things and developed these rules.

So please, please, pay close attention -- I believe it's 7 and 8 which indicate what evidence can only be used for certain limited purposes, okay. So please pay attention to that. It is very important. It's a little bit counterintuitive, and that's kind of why I draw attention to it and stress it. Because it doesn't hold -- you know, it doesn't make a lot of sense, but it's the law that the judge has given you in this case, and we all swore to follow that.

Now, I want to talk for just -- just another quick second here. So now Instruction No. 2 -- and I always point this out because it tells you the standard that you have to use. I know the State touched on this too, so I'm not going to go into great detail, but it tells you the standard that you have to use in sort of assessing the overall evidence and in making a decision about whether to convict somebody of any of these crimes, okay. It's of course the,

beyond-a-reasonable-doubt standard, okay. The Court pointed out in its opening instructions when we all first got here that in our legal system, there are varying degrees of proof depending on what it is, okay. There's preponderance of the evidence, the 50/50 standard we talked about, right. It seems more likely than not it might have happened. It's pretty -- just putting it on a balance.

Then we have clear and convincing, okay. It's a little bit higher. You have to have a little higher quantum of evidence. Well, the highest quantum of evidence is what we use in criminal cases. That's beyond a reasonable doubt. Now, I used to go into this big thing where I described to you what beyond a reasonable doubt is, but I've given up on that. I think most people have. The instruction tells you, and I would just caution you two things: Number one, it is not -- and I think we probably have -- it's not more likely than not, okay. It's something beyond that, and I just want you to bear that in mind when you're evaluating this evidence, okay. Very important that you do that. I've gone to jurors before and had people say we thought he did it. It's disheartening, okay, unless you're saying, we thought beyond a reasonable doubt he did it, okay. So please pay attention to

that; it's very important.

Instruction No. 4, each count and each defendant must be considered separately, okay. So in other words, you can't say, well, we found him guilty of Count I; he must have done all the rest of the stuff. You have to go through each one and make an independent determination based on the evidence, okay. That says as to each count charged against each defendant, as against each defendant, okay. You can't say, well, we convicted Johnson, so Kennedy's got to go too or vice versa, all right. You've got to evaluate each one of them separately. That's kind of a pain. It's probably kind of time consuming, but it's vitally important, okay.

No. 5 tells you that the defendant is not required to testify, and you can't draw a negative inference from it, okay. You can't, you simply can't. The temptation may be there. We would like to have heard, you know, this guy testify or whatever, but you can't draw a negative inference from it. That's because the defense has no burden in a criminal case to prove anything. The State bears the sole burden, and they have to prove each element of each crime charged against each defendant beyond a reasonable doubt. So let's try to hold them to that burden.

Finally, I want to talk for just a second about the gang aggravator. I've already talked about the lack of evidence of gang involvement on the part of Mr. Johnson, but I also want to point out to you that several of the individuals -- Mr. Cales, I know he testified that way. I don't remember who else it was, but several of the folks got up and when asked whether they thought this was, you know, gang-related, they said, you know, notwithstanding that gang members may have been involved, this was a personal beef. This was a person against a person. These were two people that had problems, okay, apparently over the snatched chain or whatever. But these were personalities that were conflicts. These weren't gangs that were conflicting, okay. This is not as the State, I think, wants to paint it, YGC versus EGC, all right. This is about one guy who snatched a chain off another guy, and the other guy who didn't like that and albeit disproportionately, decided he was going to take some retribution for it. Who was that guy? That was Mr. Kennedy who you saw testify.

At the end of the day, ladies and gentlemen, I would submit to you that Desmond Johnson is not a gang member. He may be associated with gang members, but not in the sense that Detective Ringer talked

about. He certainly knows people who have gang ties, gang involvement, but that in and of itself -- there's nothing wrong with that. He doesn't have any gang tattoos. He doesn't have any of the gang paraphernalia that Detective Ringer talked about in conjunction with the folks involved in gangs. He doesn't have that, it's missing.

I'd submit to you, ladies and gentlemen, that there's no evidence that he acted with the kind of knowledge he had to have to be an accomplice in this case. He took the gun out of the car and put it in the 7-Eleven -- I'm sorry, AM/PM. They're running together, these gas stations and mini-marts. That's all he did.

He should be acquitted of drive-by shooting, he should be acquitted of assault in the first degree, and he should be acquitted of assault in the second degree. And I'll leave it up to you what you should do with the unlawful possession of a firearm.

Again, I want to thank you for your time. I want to thank you for your attention. You've had a good, long-suffering journey, and we appreciate it. Thank you.

THE COURT: Thank you, Mr. Ferrell. Before we hear from Mr. Underwood, I'd just like everybody to

stand up and get some circulation going again.

Thank you, please be seated.

If you'd please give your undivided attention to Mr. Underwood for the next 40 minutes on behalf of his client, Mr. Franklin.

MR. UNDERWOOD: Your Honor, Mr. Greer, Mr. Ruyf, co-counsel, ladies and gentlemen of the jury, I always thank the jurors at the end of the trial as I do at the beginning. Last couple times I've had a co-defendant trial with Mr. Ferrell, he's kind of got the jump on me, so just suffice to say that on behalf of all of us, thank you. I think today is the 14th day, spread over four weeks. It's been fairly long for all of us. We do appreciate your time.

During the testimony, we do get chances to peek over and see what you guys are doing, how many of you are sleeping. You've been very attentive through this. Sometimes with what's going on, it's not that easy. It almost seems like you've spent more time back there then you have out here. We thank you for your understanding on that.

I'm going to kind of jump around with jury instructions in some of my closing arguments on behalf of Mr. Franklin. No. 4 is a separate crime instruction. That says that there's a separate

crime -- a separate crime is charged in each count. Your verdict as to one defendant should not control your verdict as to any other. Essentially, you need to separate and distinguish. By my counting, you've got at least eight decisions to make, and what you make in one decision -- or, what decision you make on one case and one defendant should not be held to affect the other defendant or the other counts.

No. 6 deals with prior convictions. My client did testify he does have a prior conviction. You are allowed to give any weight or credibility to those facts as you see fit. Mr. Greer in his closing -- prosecutors always do such a nice job with the light show, as we call it, on the defense side. He put his pages up there. I want to go over some of that, touch on some of that. Remember the first page, accomplice liability. That's what it's all about as far as my client is concerned. Was he an accomplice? There's no evidence -- or virtually no evidence -- that he was a principal in any of this, and there's one witness who did testify that she thought she saw a gun sticking out the left side, the driver's side of the vehicle. I'll touch on that.

But with regard to my client, it is an accomplice case. There is no direct evidence that he

had a gun. Nobody says he had a gun. There's no evidence that he fired a gun. Mr. Greer says why do people lie. People lie for a lot of different reasons, because they've got something to hide. But who says they're lying? Mr. Greer doesn't agree with them, so in his mind, they're lying.

Certainly true of Detective Ringer. I believe in dealing with Detective Ringer, it's probably legitimate cynicism from his years of police work. It's a difficult job. A lot of people that he deals with aren't going to tell the truth for various reasons. In his mind just because he believes that they're lying doesn't mean they're lying.

Mr. Greer says that this whole thing started at the 7-Eleven approximately a week before May 31st. Those was his words, starts the whole thing. For who? No evidence whatsoever that Kevin Franklin was there. Mr. Morris allegedly stole a neck chain from Mr. Kennedy during that fight. How does that involve my client? If I steal Mr. Ferrell's tie, how does that involve you, how does that involve the prosecutors, how does that involve anybody except the two parties involved? My client was not there.

The prosecutor said that four people were together that night on March 31st because gang members

roll in numbers. Quote, roll in numbers. Well, if they roll in numbers, then why does Jerome Kennedy, the week before, walk into a known YGC hangout at 54th and Birmingham and get clocked. If this is a gang thing, they're going to roll in numbers, aren't they? Remember, Mr. Kennedy said it's not a gang thing. This was between me and Mr. Morris. Just because they happen to be together -- those four together, on the night of May 31st does not turn the week before into a gang thing.

Mr. Morris taunts Mr. Kennedy afterwards in the week between the two events -- between the 7-Eleven store and May 31st. What's my client's beef in that? Where is the evidence that my client knew about that? There is none. If Mr. Kennedy was looking for trouble that night -- and I'm talking about May 31st -- with my client and the two others, if they're looking for trouble that night, if they're looking for Mr. Morris, then why do they go to the Duck? No evidence here that the Duck is a hang-out for the YGC or for Mr. Morris. Why do they go to the Duck? Mr. Morris is having a birthday party at the 54th Street Sports Bar. Where is the evidence that my client or any in this group of four that night knew about that? Do you think Mr. Morris is going to call up Mr. Kennedy and say,

hey, do you want to over to the 54th Street; I'm going to have a party and you're invited. Where's the evidence that they knew about that? If they did know that Mr. Morris was there, why go to the Duck? It wasn't until they were at the Duck that they got a phone call, and it's up in the air as to who received the phone call. It's pretty clear, I think, from the evidence that my client was not involved in that phone call. Apparently, it was Mr. Hudson and somebody else talking to Mr. Kennedy. Apparently Mr. Ragland -- I'm sorry, Mr. Ragland and Mr. Hudson communicated with Mr. Kennedy, oh, he's over here at the 54th Street. Where's the evidence that was ever communicated to my client, to any of the others?

There's talk about intoxication, and my client initially mentioned that or mentioned that that morning, the morning of the 31st when he was questioned by Detective Ringer. And Detective Ringer, no, I didn't see any signs of intoxication. Where's the proof of it? We've got 21, 22, 23, 24-year-old young men out to party on the town. Why am I going to go to The Friendly Duck on a Friday night, Saturday night, if I'm not going to drink, if I'm not going to look at the women, check things out. That's what we all did at that age. We didn't go out to go sit in a parking lot

and say, hey, you know, we're here. They went there to party because that's what young people do, people this age.

Mr. Greer also points out that when they get over to the 54th Street Sports Bar at approximately 2:00 in the morning -- we know it's around that time because the crowds are letting out -- that nobody got out of the car. Well, do we really know that? We see the white Explorer driving by, and then it's four or five minutes later before we see it again. We don't see it in the parking lot during that four or five minutes. We don't see it on the back street of Puget Sound. We don't see it over in the far distance on 54th Street. Where is it? There's no evidence where it is. There's no evidence that it's still there. It could have driven some place else. They could have parked and gotten out. We don't know that. So you can't make the leap that Mr. Greer wants you to, that, oh, they were sitting some place planning, waiting. There's just no evidence of that.

What's the motive of my client? He doesn't have a dog in this fight. He didn't lose a chain. He didn't get knocked out at the Birmingham 7-Eleven store. His motive is solely what, he's a gang-banger with these other four, these other three, so they're

going to go out and take revenge?

Mr. Greer says there's a plan. Who had the plan? He said there was two to three weeks -- his words were two to three weeks to lay it out. Well, that's not the time frame because it was only one week prior that Mr. Kennedy got knocked down over on Birmingham Street.

Sophistication. If this is so sophisticated, why do they still have the weapons at Hosmer Street? Why aren't they going out the window along I-5? They crashed into -- off the -- off I-5 into the ditch. They're running through the bushes.

With regard to jury instructions, there are lesser includeds. It's our position that Mr. Franklin is not involved in this, that he should be found not guilty of any of these crimes. Certainly if you believe that he's not guilty of the more serious ones, there are lesser includeds that you can find him guilty of if you believe beyond a reasonable doubt that he had some involvement in. They're pretty self-explanatory in the -- in the packet.

We know the timeline. I'm not really going to go over that. We know that somewhere around 2:00 in the morning my client -- just before my client and the others left The Friendly Duck, get to the 54th Street

just about let-out time. We see all the people leaving. We know the first call came into CAD about the shooting on Cedar at about 2:06. Within 30 seconds, first law enforcement individual arrives. I thought it was kind of coincidental, maybe not, that -- where did he come from. He said, I heard the shots. Where was he when he heard those shots? He's sitting in the parking lot at the 7-Eleven at 56th and Birmingham where a week before the fight that started all this happened. I guess it's not surprising. He testified this is a problem spot in South Tacoma, so he's probably down there making his presence known, but he was 30 seconds away from Cedar Street.

Then from there, the events happened where, you know, our clients end up out on Hosmer. And then shortly after that, Johnathan Ragland is murdered on 74th and Cedar -- or 74th and Oakes Street.

Instruction No. 8 is a limiting instruction that deals with the Johnathan Ragland murder at 74th and Oakes. It can be considered by you only for providing the immediate context of events close in both time and place to these charged crimes. My client had no responsibility whatsoever for what happened to Mr. Ragland. And I don't think there's anybody here that doesn't believe that was just an utter tragedy,

but my client and Desmond Johnson have no responsibility whatsoever for that.

Detective Ringer questioned my client about 8:00 in the morning, asked my client what happened. My client -- Detective Ringer doesn't think he was forthcoming. Well, he was pretty specific on, you know, 2:03, 2:04, 2:05 when we left the 54th Street Street Sports Bar, but then the next five minutes is just blank, and it's blank because he doesn't want to tell me. Maybe it's blank because my client was, as he said, passed out in the back of that car. He'd been drinking; he admitted that. He had been using cocaine; he admitted that. Now, Detective Ringer disputes that, but Detective Ringer didn't see him until six hours later.

By 2:15, my client is in the back of a police vehicle at Hosmer Street, still haven't figured out what time he got from Hosmer Street down to the police headquarters on 35th and Pine, probably a 5- or 10-minute drive. Then it wasn't until about 8:00 that he sat down with Detective Ringer. So there's six hours. Remember, I asked the officer sitting in the back of your police car, what was he doing? Don't know. I was doing other stuff. Asked Detective Ringer, down at the police station, what was he doing?

Really don't know. I was busy with other stuff.

A lot's been made of the text message from my client, I just got jacked, I'm going to give someone the blues. Mr. Greer says that there's not a lot of evidence of the event that happened the night before; therefore, that text message had to relate to the week before. Why? I just got jacked. Not we just got jacked, or my homie just got jacked, or Mr. Kennedy got jacked a week ago at the store. I just got jacked.

What does give somebody the blues mean? Well, Detective Ringer says it means one thing. My client says he was just looking to see if he could find out who did it. I'll leave that to you to decide what weight to give it, but if it doesn't relate to the break-in incident in his car the night before, then how can we -- yeah, the night before. How can we be talking about the week before, especially when you look at it as I got jacked, the singular. He didn't get jacked a week before. He wasn't there. That wasn't his fight. Why is he sending text messages saying that it happened to me? Why?

Who puts the gun in my client's hands? Nobody. Mr. Greer said that my client was on the wrong side of the vehicle, so he hands the gun over, but where's the evidence of that?

Darlene Esqueda, she was one of the first witnesses to testify. She lived on 54th Street. As you're going down, if you look at the pictures, Exhibit No. 28, I believe it is, has got some good pictures of Cedar Street, 56th to 54th, both from -- back by 56th as you get closer. Ms. Esqueda testified that she lived on the second house in from the corner to the west of 54th and Cedar. Look at Exhibit No. 8. You can't see her house in those pictures. These are police photographs, scene photographs. You can't see her house in those pictures. So if you can't see her house in those pictures, how can she see your car with a gun sticking out?

Remember, she said, I don't remember whether it was front or back window. She also said, when I questioned, her -- well, how easy is it to see down there? She said, well, it's fine if there aren't cars in the way. Cars will block my view. Look in those pictures. Two to three hours after the shooting, the morning of May 31st, the west side of that street is lined with cars, and there are two or three huge fir trees in the pictures that are taken by forensics for the Tacoma Police Department, as you're looking down Cedar Street towards 54th. You can get perspective because we know where the motor home was.

To the east and the north of the shooting location is where all the bullet shells ended up, or the casings ended up. As we move down the street in these pictures, it gets closer on this side. And as you look to this side, point out to each other where that house that Mrs. Esqueda -- and I'm not saying she's lying. Things happen, you panic, you maybe see things, think you see things. She didn't see any muzzle flashes, couldn't tell whether it was the front or the back window.

Remember, there's discussion about whether or not the shooting came from the front and back on the passenger's side. Mr. Kennedy is saying that I got one gun out the window and one out the sunroof. Well, Exhibit 28, there's a sunroof there. I think we all saw that on the video from the 54th Street Sports Bar security cameras.

Also, look at Exhibit 7, the white Blazer -- or the white Explorer at the gas station, front window is down. The back window is not down, it's still up. That may not mean anything. If it could be rolled down, it could be rolled up, but there was testimony that car was child-proof, that Portia Steverson had kids and you couldn't roll that window all the way down. Makes sense, doesn't it? If it's a feature on

an automobile and you've got young kids in the backseat, you certainly don't want them being able to climb out. So you adjust the mechanism on the car that allows those windows not to be rolled down, either partially or more than a certain distance.

Raina Proske was the nice, elderly lady who owned the motor home. She came in to testify that she heard shots. Didn't see really what was going on but heard the shots. And we know that by the time the vehicles on Cedar Street got to her motor home, the shooting was pretty much over, because that's where the shell casings ended up. You've got a couple down the street as you're coming down the street, but most of them are laying in and around her -- her motor home. So we know at that point the shooting was pretty much over, which I think, again, raises concerns about what Darlene Esqueda said she saw that night.

Let's remember, most of the people who testified about the shots said it was rapid fire. Police officer, six or seven shots. I think he said, just a matter of a couple seconds, three or four seconds, five seconds.

Jeremy Berntzen, shots come from the passenger's side. No shots from the driver's side that he saw.

Brian Grossman, he was the one whose vehicle was struck just north of the motor home. Remember, he pulled over, saw them coming down, so he pulled over to the wrong side of the road, the east side of the road. His vehicle was the one struck. I believe one of them hit his tire. It's certainly indicative of coming from the left or the passenger's side.

James Curfman, he's the individual sitting on the back porch with his wife. He heard the shots, five to six shots, as many as eight, thought it was automatic weapon because it was so fast. Seconds, he said.

I think it was Officer Martin who was sitting down at the 7-Eleven on 56th and Birmingham. He's the one who heard the shots, was up there in a matter of a couple seconds. I believe he said -- and I apologize, I can't find it in my notes. But I believe he said it was three to four to five seconds, boom, boom, boom, boom, boom, boom, boom, that quick. No delay. Remember, I asked people, did you hear any delay? No. Steady, boom, boom, boom, boom; not boom, boom, boom, boom, like somebody is just as fast as they can pulling those triggers.

Mr. Kennedy -- Instruction No. 7 is a limiting instruction. Says that any statements made by

Jerome Kennedy to Mr. Ringer or were made to Detective Ringer could be considered only for that purpose in assessing the credibility of Jerome Kennedy.

Mr. Kennedy can say anything he wants. One point, he said, yeah, I got the gun from my client. Then he says he brought the guns. He made a third statement about something. I remember asking Detective Ringer, aren't they about 180 degrees opposite? Yes.

What control does my client have over what Mr. Kennedy says? None. I can say, hey, I was sitting here talking to my client. He got mad so he smacked me. Can he prevent that? No. Does it make it true? No.

Prosecutors called Jerome Kennedy, they called Conrad Evans, they called Curtis Hudson, and they called Steven Cales. The prosecution called them. Didn't like their testimony, so now they're saying, well, you can't believe them. Real credibility issues there. They don't get it both ways. You called them. Don't call them liars now.

It's the same with Detective Ringer. You know, Detective Ringer asked questions. If he doesn't like the answer, he just says, well, I don't believe this person. He says, well, he was pretty bent on telling me the time that they got there and the time

that they left, but he can't remember the next five minutes. He can't remember because he doesn't want to. He doesn't want to tell me. Maybe he can't because he was passed out as he said. Maybe he had been drinking as he said. Maybe he had been doing cocaine as he said. Why go drinking at the Duck if you're not going to drink? Because they're out looking for a fight? If they're out looking for a fight with Johnny Morris, why go to the Duck? Why go looking for Johnny Morris when you don't even know where Johnny Morris is?

Let's also not forget that the last time for a text message from my client was about 1:45, 1:43, I think it was. No more after that. Why? Well, because he's just tired of texting her.

There was a call made to Madre Combs because they needed a ride. My client didn't make the phone call. Prosecutor says, well, they needed a ride because they just wanted to dump their car there because they'd just been involved in this shooting. They needed to get away, and Madre Combs was that excuse. The fact of the matter is they did need a ride. The car was broken down. They barely made it from the freeway where they crashed to Hosmer Street. Maybe that's why they connected with Madre Combs. Hey, where are you at? Okay, fine, why don't you go

there -- you know, our car is broken down. We need a ride.

There was a conversation -- a lot made of the conversation between Conrad Evans and Portia Steverson regarding reporting her Explorer stolen. Where's the evidence that my client was involved in that conversation? He had nothing to do with it. I make a phone call out in the hall, does my client control that? I make a phone call from my car with my client sitting in it. What does he have to do with it?

This is a case, with regard to my client, about circumstantial evidence. That's all it is with my client, is circumstantial evidence. No eyewitness, other than Mr. Kennedy who said he got the gun from my client. And then he changes that and says, well, I brought the guns that night. Even Detective Ringer after I talked to him about that says, I really didn't even believe him. I didn't trust him, I didn't believe him, but they were willing to cut a deal with him. They were willing to have him work for them until they found out, as Detective Ringer testified, yeah, we tell him what's going on, we tell him this is what he wants to do. What does he do? He goes out and tells everybody who's targets of our investigation that, hey, you're being looked at by the police.

THE COURT: Counsel, you have approximately five minutes left.

MR. UNDERWOOD: Thank you, Your Honor.

With regard to the gang aggravator, I'm going to touch on it too. You're probably bored with it. But just because two people allegedly from two different gangs get in an argument, a fight, that doesn't mean it's gang related. It doesn't mean that other alleged members of that gang are also in on that fight. This was an incident at the 7-Eleven on Birmingham that started this. My client didn't have a dog in that fight. It wasn't his necklace. This was a beef, as Mr. Kennedy said -- again, what are you going to believe of Mr. Kennedy? This was a beef between him and Mr. Morris.

The law is very specific on what you're supposed to consider for the gang aggravator: The offense is committed with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage to or for a criminal street gang, its reputation, influence or membership.

Where is the benefit here? I guess, you know, Mr. Ringer -- Detective Ringer, Mr. Greer believe that there's been benefit in gang members rumbling with each other because it gives them street credibility. I

guess -- I don't know. Maybe an advantage in that if I get to beat up on Johnny Morris, then I get to tout that I'm a tough guy. Kind of like the playground bully, isn't it? Well, yeah, maybe he wants to fight it, and make it a gang issue.

The prosecution is required to prove beyond a reasonable doubt that my client was involved in this shooting, either as a principal or as an accomplice. There's no evidence here that he was an accomplice -- or as a principal, rather. Everything that points to him as being an accomplice is strictly circumstantial. It is thin, it is very thin. He's in a vehicle when this occurs.

The prosecution has not proven this beyond a reasonable doubt. We would ask for not guilty verdicts for my client as charged.

THE COURT: Thank you, Mr. Underwood.

Ladies and gentlemen, because the State has the burden of proof in this matter, the Court does allow him to have a rebuttal. Mr. Greer, you have the next 10 to 15 minutes.

MR. GREER: Thank you, Your Honor. I'm going to go quickly.

Obviously street credibility is the benefit that these individuals gain, not only for themselves,

but for the gang. The gang, as Detective Ringer indicated -- street credibility is the most important thing for individual members, as well as for a gang. The YGCs at this time were having problems with the Hilltops, with the EGCs. They were the problem gang out there. 54th Street bar, this particular evening, of course, where Mr. Morris was having his birthday party, logically YGCs there. Why would these individuals go to The Friendly Duck and not 54th Street? Because they had to plan the idea to go after Mr. Morris, and they needed to separate him from the herd. That's why they waited till closing time. That's why they went there for 10, 15 minutes or so -- 10 certainly -- and hovered around and talked.

Why did the defendant, Mr. Franklin, put, I'm about to go give somebody the blues. The, I just got jacked, whatever he means by that we'll never know, but certainly, I'm about to go give somebody the blues at 1:37, and then he arrives in a white Explorer with three others. That's a communication that he's having with Lady Monster. Do you doubt that he's having a communication of that nature with the driver of the car that's taking him to give somebody the blues? He's a backseat passenger. Do you think he's not talking to front seat person, Mr. Kennedy, who actually has the

beef with Mr. Morris?

Do you think the defendant, Mr. Johnson, who's called and then goes out late at night to The Friendly Duck, and then sits in that car for 10 minutes, goes to the 54th Street place, never gets out, is involved with these individuals? Do you think that there is a joint understanding that there's going to be an assault of some nature? Of course there is.

Now, the defendant, Mr. Franklin, he is not credible on the stand. He was not, when he spoke with Detective Ringer at the time, credible, saying he was intoxicated at 8:00 in the morning. Well, Officer Jensen interviewed him at the Chevron station. No signs of intoxication. You saw him as he's walking. You can watch that again. There's stills. He is not acting as a person who would logically be intoxicated.

This issue of rules and regulations, it's important for the State to stress that Mr. Johnson, who by all accounts, you know, is a -- seems to be a reasonably, you know, together person -- again, this is not a character issue. It's not about how anybody looks. I want to put up here the text messages. Defense counsel casually mentions the issue of these text messages. Now, you haven't seen them yet, what's been found in the individuals' phones. How to express

this? It's -- it's smoke and mirrors to say that a community in Tacoma that's low income, that's pretty racially -- you know, has a certain racial make-up, either the Cambodians on the East Side. Predominantly in the South Side there's a lot of African-Americans. To say that because an African-America male grows up, goes to school, goes to high school with individuals that happened to then be gang members, and then is in a situation like this, that that's something that the State is trying to color that person with a brush and say he must be a gang member too. Then defense wants to take it all away and back it all up and say they're just friends. They're just people that grew up together. This is not a person of the mindset of a gang member.

Really? Look at Mr. Evans' phone. He says -- he calls his phone -- his name on his phone is Cowboy Colione. He denied that. That is what he calls himself. That's Mr. Evans. Okay, look at the contacts in his phone. He has -- it's hard to read from where you are, and I have terrible eyes. Let me actually open this up.

Here's what Mr. Evans has to say in his phone. From Tac town, finest ESGs. It's Cowboy Colione. You're fucking with a real gangster. I'm the

league leader. I'm going to keep Crip walking. It goes East Side Gangster Crip; we real about this Cripping shit, okay. That's his friend he grew up with.

Mr. Johnson's phone, the contact list with monikers. Every name, moniker name, with a CC, no Ks, no Bloods -- Blacc Loc, CC Loc, Blue Locsta, B C Boy, which happens to be Conrad Evans' number, C Boy. TK Loc, which is Mr. Kennedy, Big Mex, Slicc with two Cs, Slim Loco, Daddy Solo. Who's Daddy Solo if he's Solo?

Mr. Kennedy's phone, Marcus Jenkins listed as Karupt. KB, Little KB monikers, Lalo, Little T Lay, Curtis Hudson is TY.

Mr. Franklin's got his screen. When you turn it on with the image of his back with the EGC, Lady Monster. Text exchange -- and this is what we're talking about -- handling business, going to go handle business, give someone the blues. Then he also had Jerome Kennedy's number -- Big Ducc, Little Ducc with two Cs.

I mean, you can fool people; you can certainly fool people, but when you use common sense, and you look at the physical evidence in this case -- what did Detective Ringer say about associates, about people who hang out with the gang members? In order to

continue hanging out with gang members, what do you have to have? Loyalty. Are these individuals going to accept this person right here, Mr. Johnson, in that car, with guns, shoot out of that car, abandon that car, get in a different car, go to some other location without telling him what's going to happen and making sure that he's on board? Because if he just grew up with these guys and he just happens to be at the wrong place at the wrong time, don't they run a huge risk that he's actually going to tell the truth? He didn't come close to telling the truth when he was contacted by law enforcement. Don't be mistaken about what he said. Here's what Mr. Johnson had to say. He said, I don't know anything about anything. Really? Okay. Keep talking, known Mr. Evans for some time, got the call about 2340 hours from Mr. Evans, agreed to go out, two other occupants in the car, didn't know them well, drove around and drank and smoked. Denied going to any bars. No confrontations except at 56th and Tacoma Way.

Isn't it curious that every single person in that car said the same exact thing? The only time there was gun play was at 56th and Tacoma Mall Boulevard. Not one of them said anything about Cedar Street, but they all said something about that location. They were on the same page.

What else did he say? I'll tell you what else he said. He put a gun in the hand of the right rear passenger. He said they were shot at at 56th and South Tacoma Way, and Mr. Kennedy in self defense in some fashion, picked up a gun and fired it out the window. And he said the person in the right of the vehicle shot out the rear window, arm out the rear window. Why would he say that? Why wouldn't you say Mr. Kennedy went this way and shot the guns? And does it make any sense whatsoever once again that the defendant, Mr. Johnson, would grab the gun? He's been convicted of a serious offense. He stipulated to that. That's the predicate for the unlawful possession of a firearm in the first degree. Does he get out of that car that he just happens to be in with his friends that he grew up with and run some place or go into the store and wait and then lie? No, he actually physically takes a gun that's a felony for him to touch and possess, and he goes in there. He doesn't just hide the gun, he hides everything. He does, in all different places. He's cool about it. Look at the pictures. He's completely cool about it.

THE COURT: Counsel, you have another five minutes.

MR. GREER: Thank you, Your Honor.

Accomplice liability, the State does agree with defense counsel. It's prospective. He's absolutely right. You do not convict either one of these individuals, including Mr. Johnson, for hiding stuff after the fact, rendering criminal assistance. Those are the kinds of charges Mr. Ferrell was alluding to. Those aren't charged here. That's not what the State's alleging. The State, in fact, is alleging that it was before the crime that the defendant had knowledge, and that he assisted either by firing that gun certainly is what everything points to at a minimum, by being in that car. And I'm going to read you the rest of the accomplice liability instruction because defense counsel told you some of it, but not all of it. It says, in relevant part, "The person is an accomplice in the commission of a crime if with knowledge that it will promote or facilitate the crime, agrees to" -- then it goes on -- that word, "aids," I underlined. You're not going to find underlining in your packet.

Then there's a whole paragraph about what aid means. "Aid means, either by words, acts encouragement, support or presence. A person who is present at the scene, is ready to assist by his or her presence, is aiding in the commission of the crime.

However, more than mere presence and knowledge of the activity of another must be shown to establish that a person present is an accomplice."

And you get back to what I talked about initially and how this all works together. Hopefully, I'm confident that you are getting it. I'm not trying to act like I'm arguing to school children, but I do need to reiterate.

The accomplice liability statute, the unit of prosecution so to speak, this assault, you determine what was the intent of the person shooting, the person that actually is acting on the assault. I gave you the statement, Mr. Kennedy's shooting. And if he's intending to inflict great bodily harm, whether he does it or not, but that's his intent, and he's guilty of assault for making that effort again with his transferred intent, then those who participate even by mere presence, encouragement, willing to assist with knowledge that that's what this assault -- not the shooting -- let me be clear, this assault, they're all equally guilty.

Accomplice, a principal, same thing. The guy driving the car is just as guilty as the guy who robs the bank under the law. Accomplice just is a definition of what a person's role potentially was or

how they participated in the crime. But the culpability is equal if the person had knowledge of the crime that was to be committed. I would suggest to you again that the planning took place well beforehand as evidenced by I'm going to give somebody the blues, getting together with four apparently disparate people, two guns in the vehicle, not just Mr. Kennedy's two. They're in there, they're over, they're hovering, they're waiting for their target. Their target gets out, they move Curtis Hudson and the others away. They pinpoint it and they do it, and they take off to a waiting car. Try to get in that and leave, try to report the vehicle stolen, and it just gets messed up.

In a few very -- I would call them less than significant things I want to comment on in rebuttal. The YGCs at the 7-Eleven, in fact, there were -- there was more than Mr. Kennedy. There was Mr. Kennedy, Mr. Evans, Mr. Hudson, Mr. Combs. Mr. Cales and Mr. Morris were there with a bunch of YGCs. It got separated and turned into, of course, as you know, a gang-type altercation that required police involvement, when apparently two girls started fighting, and the rest went from there.

There are disputes the State has with the way defense has characterized witnesses that appeared

on the stand. Kennedy being a scary guy. You know, the State believes, based upon his appearance in Court, his fear, the fact that as in the phone calls that Mr. Franklin's making, in discussions that he's making as recently as yesterday afternoon on the phone -- you know, he's checked, he's a snitch, he no longer can call himself K Loc, that kind of stuff. He's on the stand doing everything he can to now go back on what he did, which is talk to law enforcement early on. Give statements, you know, inculpate others, that kind of thing. That word got out. He's a marked man. He didn't appear to be a scary, frightening person. He appeared to be a scared person.

Now, how that plays into assessing the credibility of him on the stand and the overall case is just a myth. It's a dispute the State has with the defense, and it's unfortunate. The State accepts its responsibility and the difficulty, I guess it is, to prosecute these kinds of cases, but nobody's asking for sympathy. That's the way it is. The evidence in this case proves these defendants all acted in concert, and all should be held accountable to the same level.

Do not -- do not buy into the argument that a person post-graduate or post-high school or up in the age of these other individuals was just hanging out

with the wrong people that particular night. Look at his phone, look where they're going. Detective Ringer, go to 54th Street once, go twice, slow learner. Everybody knows that. It's their neighborhood. The people he chose to put himself with that night, the actions that he chose to involve himself with, he has to own. He pulled the trigger. I was going to pull out the gun and show it to you, but I'll just say because I think I'm on my last minute.

THE COURT: I was just going to ask you to start coming to a conclusion.

MR. GREER: I'm done. I just want to say one other thing. You know, when you watch TV, you see people shoot guns and you see people fall, and it's just no big deal because you don't -- they're not dead. You know that. It's not a big deal. Children watch TV shows like that now. You know, we're numb to it. We're absolutely numb to the violence in our culture.

But on that street -- on Cedar Street, two individuals took heavy guns and they weren't on TV. And I asked the crime lab person a question about how much trigger pull, how much pressure does it take to pull a trigger? Ten pounds for one of those guns. Lifting up a 10-pound bag of groceries, and there were at least five shots from the .38, logically, by the

shell casings. And there definitely was eight -- were eight from the other gun. It's not a game. People die.

They should be held accountable and they're guilty. The State has proven the case, and you should find both individuals guilty as charged. Thank you.

THE COURT: Thank you. Ladies and gentlemen, I'm now going to excuse you to start deliberation. Ms. Mangus, at some point in time, will be bringing some of the exhibits in which you have a right to have present. You will not have the guns present in the jury room. If you decide you want to view or see them, you can make a written request to do so, but we have strict guidelines about jurors having weapons, even though they are secured. So we can and will try to accommodate you, but they will not be brought into the jury deliberation room with you. That's probably the one exception.

If we do bring CDs or videos into the jury room, I repeat, you are not to play them on your own personal devices while you're deliberating. If you decide you want to request permission to see them again or to hear them again, again, you have instructions to read that the presiding juror can make a written request to do that. But do not take it upon yourselves

to put it in your laptop or any other electronic device that you have handy in the jury room. Because I've told you throughout you're not to go on any of your internet devices and seek any type of information out that applies to this case.

Juror No. 14, do you have personal belongings in the jury room? I would like the rest of you to remain seated. Juror No. 14, would you put your material on your chair and go get your personal belongings because I have some specific instructions I need to read to you. But I don't want you to intermingle right now with your fellow jurors in case they start deliberating while they're walking in the room. Yeah, I want you to come back.

Okay, Ms. Mangus you have the Court's permission to escort the jurors with your notepads and your jury instruction. And once the door is shut, you have permission to go ahead and start deliberating.

(Jury excused.)

THE COURT: I need to read to you some -- you may be seated. Thank you. I need to read to you some specific instructions that apply to you as an alternate. At the outset of this trial, Juror No. 14 was selected as an alternate juror in case one of the jurors became unable to serve on the jury. I am now

able to temporarily excuse the alternate juror from further service in this case. You are now temporarily excused. You are not, however, fully released from this case. You could be recalled for further service if one of the deliberating jurors becomes unable to serve. Accordingly, my previous instructions regarding your activities outside the courtroom still apply to you, and they will continue to apply to you until the full jury has completed its deliberations, and has been discharged from this case. To repeat those instructions, do not discuss this case with anyone. If your family, friends or anyone else asks you about the case, you are to explain that you are not allowed to talk about it. Do not read, view or listen to any report from the newspaper, magazines, radio or television on the subject of this trial. Do not consult reference materials, the internet or other sources of information. Do not permit anyone to comment on this trial to you or in your presence. It is important that you keep your mind free of outside influences in the same manner as if you were already one of the jurors deliberating in this case. You are not to try to find any evidence or do any legal research on your own. Do not inspect the site of any event involved in this case. If your ordinary travel

will result in passing or seeing the site of any event involved in this case, do not stop or try to investigate. Again, you must keep your mind clear of anything that is not presented to you in this courtroom.

We will contact you if you're needed further in this case. In the case you are not needed further, thank you for your service to this court and to our system of justice. The work that you have done as an alternate juror was necessary for a fair and efficient trial.

At this time, sir, I want to say to you that you are on standby, and you need to make sure that you have information that Ms. Mangus can contact you about so that we can get ahold of you as quickly as possible. Because we have had cases where another juror has been unable to complete the deliberations, and we have had to bring back an alternate juror to continue those deliberations. So I sincerely mean it in the truest form of sense, you're on standby. But in the event that you aren't needed, I just want to give you this certificate of recognition for participating in this trial. And thank you so much.

Mr. Thomas, just before you leave, make sure Ms. Mangus has your contact information. And as all

counsel have indicated, we appreciate your service.

(Juror No. 14 excused.)

THE COURT: Gentlemen, at this point in time we need to go off the record for a bit. This is the opportunity where you folks examine the exhibits that are to be delivered to the jury room. You've heard me say that I'm not going to deliver the firearms unless they request it, but all other exhibits, I believe they're entitled to have with them in the jury room.

And I need to put on the record that Ms. Mangus is given permission to take those exhibits, with your permission, back to the jury room so that they may continue their deliberation. And as soon as she gets back, I think we can just go off the record and you can start talking about this issue. Then I'll come back on the record when she is ready to deliver those exhibits.

MR. FERRELL: I know we've had the exhibit list now for a little while. I think we've probably all had an opportunity to examine it.

THE COURT: Mr. Ruyf.

MR. RUYF: Your Honor, if I can just bring up the technology for a moment. The Court has asked that we have this on hand. I will have it on hand. I believe that the consensus between the parties was

Mohammed from the court system will ultimately be taking care of that. Since we're running here to the end of the day, it's not likely we'd be able to make those arrangements. So I don't know if everybody would agree that if the jury immediately wants to watch media or whatnot, the answer would be tomorrow when they come in so that we can make that arrangement since we haven't done so.

THE COURT: Mr. Ruyf and counsel, it would be my intent that due to the hour that we have at this time, that any jury questions or requests for view of any of the material would be obtained by Ms. Mangus and locked in her drawer until we give you adequate contact in order to look at that request together with all parties present. Mr. Johnson is still on his own PR or on bail?

MR. FERRELL: Yeah. He's on conditions of release, Your Honor.

THE COURT: I just want him to know -- and all persons to know -- that you need to be within 15 or 20 minutes from the courthouse. Because I believe that there's going to be a need to get together starting tomorrow morning, so I would advise everybody to stay close to the courthouse. And I technically go on recess on Monday, but if this jury is still out, I'm

not going to go on recess. My staff will, but I'm going to stay here until this case comes to a verdict, just to let you know. Because I'm not going to try to have another judge --

MR. FERRELL: Troubleshoot all the issues.

THE COURT: Yeah. I think that would be unduly unfair for a judge to try to do that in light of this case. So that's the circumstances.

Ms. Mangus, just meet with these gentlemen. Make sure that you have their permission and all the proper exhibits, and you can bring them back in.

MR. UNDERWOOD: Your Honor, just one other issue. I have been coordinating with Ms. Mangus and the Department of Assigned Counsel. I am scheduled for court appearances in Lewis County tomorrow, so assigned counsel will be here covering. They know how to get ahold of me. I've given my cell phone number to Ms. Mangus.

MR. RUYF: Your Honor, since the Court will be functioning, I'm willing to leave the prosecutor's office laptop and speaker down for Mohammed to put together for everybody. If the Court's functioning, to have it set up and ready to go out here doesn't quite make sense. And because the technology would require either speakers and/or the screen, it might not be

something that the jury would be able to attend to in the jury room. And so I'm happy to accommodate the Court in any way. I just want to know what kind of condition the Court would have me leave the equipment in.

THE COURT: I just think we leave it as is right now. You take your material with you, and it will -- depending on what they want to see or hear, it's obviously going to take some time to get everybody together and hopefully with your -- you and Mohammed coordinating with each other, we can get that done fairly easily.

MR. RUYF: I'll take it with me tonight and then bring it back with me tomorrow.

THE COURT: We do have a motion calendar tomorrow. I have to give a decision in the afternoon on a family court matter and sentencing, but you have first priority, so we'll call you as soon as we hear something.

MR. FERRELL: Thank you, Your Honor. Just for the record, I've advised my client -- I know the Court said 15 or 20 minutes, but I'd like him to be within 10 minutes of the courthouse.

THE COURT: I think that would be very advisable.

MR. FERRELL: I mean, you know, you get a guy getting out of the shower, whatever, you know, he may need a little additional time to get put together or come down. So I just wanted to advise the Court of that. Thank the Court for the trial. It went very well. Thank you, Your Honor.

MR. RUYF: Thank you, Your Honor.

THE COURT: Ms. Mangus, you have the last word.

THE CLERK: Thank you, Your Honor. We have a jury in there. I'd like to tell them they can go home for the day.

THE COURT: Do they want to go home or do they want to spend some time?

THE CLERK: They've got six minutes. Do you want them to take six minutes?

THE COURT: I have more than six minutes, but tell them we'll knock on the door at 4:30 and see what they say.

MS. MANGUS: They don't have any of the exhibits, and I haven't given them my spiel.

THE COURT: Okay, so go in there. Hold on one second. Have you got the exhibits in order to deliver?

THE CLERK: Yes, all -- no. Okay, I have

them, from what I believe, is all the admitted exhibits except the weapons. If Counsel would like to come look.

THE COURT: I would. That's what this is all about.

(Off the record discussion.)

THE COURT: Counsel, have you examined the exhibits to determine that only those admitted into evidence are included to be sent to the jury room? Mr. Greer.

MR. GREER: Yes, sir.

THE COURT: Mr. Ferrell.

MR. FERRELL: Indeed, Your Honor, I have. Thank you.

THE COURT: Mr. Underwood.

MR. UNDERWOOD: Yes, Your Honor.

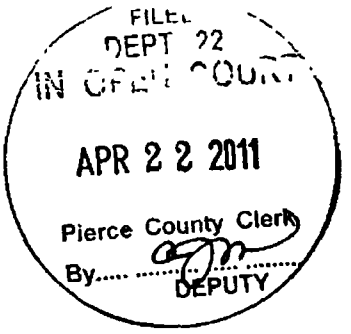
THE COURT: Ms. Mangus, you have permission to deliver those exhibits to the jury room.

THE CLERK: Okay.

(End of transcript.)

APPENDIX "H"

09-1-02724-4 36273438 FNFCL 04-25-11



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEVIN WAYNE FRANKLIN Defendant.	CAUSE NO. 09-1-02724-4 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING 3.6 HEARING RE: SEARCH WARRANT

THIS MATTER coming on for jury trial before the Honorable John R. Hickman, Judge of the above entitled Court, on the 7th day of March, 2011, the State being represented by Gregory Greer and Jason Ruyf, Deputy Prosecuting Attorneys; the Defendant being represented by counsel, Michael Underwood, the Defendant having been charged by information with the crimes of Assault in the First Degree, Assault in the Second Degree, Unlawful Possession of a Firearm in the First Degree, and Drive-by Shooting; the Court having reviewed the Complaint for Search Warrant and heard the argument of counsel, the Court having considered the Complaint for Search Warrant in light of the requirement that it contain facts and circumstances sufficient to establish probable cause to believe that the Defendant was involved in criminal activity, that evidence of that crime could be found in the places to be searched, and that there was a nexus between the criminal activity and the places to be searched, the Court makes the following Findings of Fact and Conclusions of Law

ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office (253) 798-7400

Case Number: 09-1-02724-4 Date: June 17, 2016
SerialID: 6E0F7DF7-C0A1-4FF0-8059A7ADD3F99[illegible]-0102724-4
Certified By: Kevin Stock Pierce County Clerk, Washington

FINDINGS OF FACT

I.

The Court hereby incorporates the "Complaint for Search Warrant" into its finding of facts. In addition to the below listed findings of fact, the Court adopts the factual circumstances and evidentiary connections set forth in the attached "Complaint for Search Warrant." See Attachment A.

II.

Upon review of the "Complaint for Search Warrant," there is probable cause to believe that the cell phone calls among Jerome Kennedy, Curtis Hudson, and Jonathan Ragland coordinated the arrival of Jerome Kennedy, Conrad Evans, Desmond Johnson, and the Kevin Franklin to the 54th Street Bar, where their initial contact was made with their intended shooting victim, John Morris There is also probable cause to believe that several minutes after arriving at the 54th Street Bar, Jerome Kennedy, Conrad Evans, Desmond Johnson, and Kevin Franklin followed the vehicle occupied in part by John Morris and began shooting at John Morris's vehicle while their respective vehicles were traveling down S Cedar Street There is probable cause to believe that there was a brief time lapse between the calls referenced above and the subsequent shooting.

III

Upon review of the "Complaint for Search Warrant," there is probable cause to believe that the vehicles containing Jerome Kennedy, Conrad Evans, Desmond Johnson, Kevin Franklin, Curtis Hudson, Jonathan Ragland, and Marcus Jenkins, had been traveling together just before Jerome Kennedy, Conrad Evans, Desmond Johnson, and Kevin Franklin began shooting at John Morris's vehicle.

IV

Upon review of the "Complaint for Search Warrant," there is probable cause to believe that several minutes after the shooting on S Cedar Street, while traveling on 72nd and Oaks, John Morris returned fire on a vehicle occupied by Curtis Hudson, Jonathan Ragland, and Marcus Jenkins The shooting on 72nd and Oaks caused the death of Jonathan Ragland.

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V.

Upon review of the "Complaint for Search Warrant," there is probable cause to believe that data obtainable from the cell phones carried by each of the above referenced individuals could have provided police with geographical information useful in pinpointing the location of each individual during the time of each shooting as well as each vehicle's route of travel to and away from the respective shooting scenes.

VI.

Upon review of the "Complaint for Search Warrant," there is probable cause to believe that the occupants of the white Ford Explorer, i.e., Jerome Kennedy, Conrad Evans, Desmond Johnson, Kevin Franklin, were in contact with Madre Combs via cell phone several minutes after the shooting on S. Cedar Street and just before the Ford Explorer's occupants arrived at the Chevron station where Mardre Combs was located with his vehicle. There is also probable cause to believe that Jerome Kennedy and Kevin Franklin exited the white Ford Explorer upon arriving at the Chevron station and walked directly to Madre Combs' vehicle, further, that Jerome Kennedy and Kevin Franklin entered Mardre Combs' vehicle and that a handgun matching the casings recovered at S. Cedar Street was found within Mardre Combs' vehicle when Jerome Kennedy and Kevin Franklin were removed.

VII

Upon review of the "Complaint for Search Warrant," with a specific focus on the brief time lapse between shootings and the coordinated activity observable at the Chevron station among Jerome Kennedy, Conrad Evans, Desmond Johnson, Kevin Franklin, and Madre Combs, there is probable cause to believe that the cell phones obtained from each individual would reveal evidence of the men's coordinated attempt to abandon the Ford Explorer used in the S

Cedar Street shooting and effect an escape in the vehicle parked at the Chevron station by Mardre Combs.

VIII.

Upon review of the "Complaint for Search Warrant," there was probable cause to believe that John Morris had been placing cell phone calls to Jerome Kennedy in the week leading up to the two shootings regarding a fight that had taken place between the two men one week before. There is also probable cause to believe that John Morris had placed a cell phone call to Jerome Kennedy after the shooting, during which he suggested his involvement in the murder of Jonathan Ragland.

IX.

Upon review of the "Complaint for Search Warrant," there is probable cause to believe that each of the individuals referenced were either directly involved in or possessed material evidence of the events leading up to both shootings and that the cell phones carried by each man, given the reported use of those cell phones before, during, and after each shooting, were reasonably likely to contain evidence relevant to the shooting on S. Cedar Street as well as the murder on 72nd and Oaks

CONCLUSIONS OF LAW

I

The Court has jurisdiction over the parties and the subject matter.

II.

The "Complaint for Search Warrant" contained facts and circumstances sufficient to establish probable cause to believe that the Defendant was involved in criminal activity.

///

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III.

The "Complaint for Search Warrant" contained facts and circumstances sufficient to establish probable cause to believe that the cell phone recovered from the Defendant contained evidence of the Defendant's criminal activity.

IV.

The "Complaint for Search Warrant" contained facts and circumstances sufficient to establish probable cause to believe that there was a nexus between the Defendant's criminal activity and the Defendant's cell phone.

V.

The Court's oral ruling on these issues was given in open court in the presence of the Defendant on the 7th day of March, 2011.

These findings and conclusions were signed this 22 day of April, 2011.

FILED
DEPT 22
IN OPEN COURT
APR 22 2011
Pierce County Clerk
By ..... DEPUTY

JOHN R. HICKMAN
JUDGE

Presented by:

Jason Ruyf
Deputy Prosecuting Attorney
WSB# 38725

[ ] Approved as to form and content; or
[ ] Approved as to form but not content:

Michael Underwood
Attorney for the Defendant
WSBA# 13218

Kevin Wayne Franklin, Defendant

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Tacoma, Washington 98402-2171
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ATTACHMENT A

Office of the Prosecuting Attorney
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Tacoma, Washington 98402-2171
Main Office (253) 798-7400

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

COMPLAINT FOR SEARCH WARRANT

(Evidence)

State of Washington) Cause No.: 09-1-50597-9
)
)
County of Pierce)
)
)

THE STATE OF WASHINGTON TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

WHERE AS, Detective J. Bair #388 has this day made complaint on oath to the undersigned, one of the Judges of the above entitled court in and for the said county;

That on or about the 31st day May, 2009 in Pierce County Washington, felony, to-wit: Murder in the 1st degree RCW 9A.32.030 was committed by the act, procurement or omission of another, and that the following evidence is necessary to the investigation and/or prosecution of the said offense, to-wit:

Items to be searched, and evidence to be searched for

1) Any and all data to include secondary storage and Deleted data that includes but is not limited to call history, SMS/MMS content, sound, video and image files, and proprietary files for cellular handsets: Samsung model SGH-A237, Nextel model I930, 2 Blackberry's - both Model 8320 (Titanium), Palm model Centro, Samsung model SGH-A737, Motorola model C1681 and a Samsung Blackberry model SGH-I617.

The above listed items are material to the investigation or prosecution of the above described felony for the following reasons:

It is necessary to the ongoing investigation of this case to show facts or information, (if available), that may lead to the identification of any suspect(s) that have been engaged in the violation in this case.

ALL OF WHICH ARE EVIDENCE OF THE COMMISSION OF AN OFFENSE UNDER R.C.W. CHAPTER 9A.32.030, and that the AFFIANT verily believes that the above evidence is concealed in or about a particular place or vehicle, to-wit;

Properties to be searched

Cellular handsets:
Samsung model SGH-A237, Nextel model I930, 2 Blackberry's – both Model 8320 (Titanium), Palm model Centro, Samsung model SGH-A737, Motorola model C1681 and a Samsung Blackberry model SGH-I617.

Located at:

Tacoma Police Department
3701 S. Pine Street
Tacoma, WA 98409

The above items are material to the investigation or prosecution of the above described felony for the following reasons:

Evidence of the crime.

Probable Cause to Search Properties

This case is currently being investigated under Tacoma Police Department case number 09-1S10148.

On May 31st 2009, at approximately 0205 hours, officers were dispatched to the area of 5400 South Cedar for shots being fired. Multiple citizens reported hearing gunshots in the area and indicated the shooting was from what some described as a white older mid sized pickup type vehicle and others said was a white Sport Utility Vehicle. Officer David Johnson was responding to the area and observed a white 1996 Ford Explorer, Washington License 079-VCT, traveling at a high rate of speed in the area of 72nd and Interstate 5. The vehicle then turned eastbound onto 72nd Street. Officer Johnson noted that the vehicle was smoking and traveling on a flat right rear tire. Officers were able to turn around and observed the vehicle in the parking lot of a Chevron gas station located on the southwest corner of 72nd and Hosmer Street. Four subjects exited the vehicle, with two entering the business and two others enter a second vehicle in the parking lot, which was described as a tan 1979 Oldsmobile Cutlass, Washington License 224-VCT. Additional officers responded and detained the four occupants of the Ford Explorer as well as the driver of the Oldsmobile Cutlass, who had entered the store also. Officers had observed one of the occupants of the Explorer, Desmond Johnson, dump something in the trash outside the business and upon looking, found that it was five shell casings from a .38 caliber handgun. Officers were then able to view the video footage for the business and observed that Desmond Johnson had also dumped additional bullets, a holster and a .38 caliber handgun inside the store prior to being detained. These items were subsequently recovered by Tacoma Police Forensics personnel. Additionally, when officers scanned the interior of the tan Oldsmobile, they observed a .40 caliber semi-automatic handgun partially concealed under the

front passenger seat. All of this is documented under Tacoma Police Department case number 09-1510139.

During this same time frame, Officer Jennifer Strain was responding to assist the officers making contact with the persons at 72nd and Hosmer Street. While in the area of 72nd and Oakes, Officer Strain heard shots being fired and observed a maroon Oldsmobile Cutlass, Washington License 790-PSG, at a high rate of speed southbound on Oakes approaching 74th Street. The vehicle continued southbound thru the intersection, nearly striking Officer Strain's vehicle. Officer Strain was able to turn around and found that the maroon Oldsmobile had come to a stop south of the intersection. Officer Strain and Officer Robillard made contact with the vehicle at that time and found that the driver of the vehicle, John Kyle Ragland,. had suffered a single gunshot wound to the back of his head. Two other persons, Markus Jenkins and Curtis Hudson, were in the vehicle as well and were detained at that time. Medical aid responded and Ragland was pronounced dead at the scene.

Detectives responded to both the shooting in the area of 5400 South Cedar and the homicide at 74th and Oakes. Crime scene investigations were done and several items of evidence were located. Detectives at 5400 South Cedar located several .40 caliber shell casings, which is consistent with the semi-automatic handgun observed in the tan Oldsmobile contacted by officers at 72nd and Hosmer Street. Two bullets that appear to be .38 caliber rounds were located as well. These rounds are consistent with the firearm recovered by Tacoma Police forensics personnel from inside the store at 72nd and Hosmer Street.

Detectives at 74th and Oakes located several .40 caliber shell casings at this scene as well. One bullet, believed to be .40 caliber, has been located as well.

Detectives have conducted interviews with the persons detained at 72nd and Hosmer Street who were identified as Conrad Evans Kevin Franklin, Jerome Kennedy, Desmond Johnson and the driver of the tan Oldsmobile, Mardre Combs. Specifically, Desmond Johnson, who was a passenger in the white Ford Explorer, told detectives that two occupants of the Explorer were shooting at another vehicle after the occupants of that vehicle began shooting at them. Johnson had been advised of, acknowledged and waived his rights prior to the interview. Jerome Kennedy, who was also a passenger in the white Ford Explorer, also said that they were being shot at by the occupants of another vehicle but initially denied that he, or any of his associates, shot back. Kennedy had also been advised of, acknowledged and waived his rights prior to speaking with detectives. Both Johnson and Kennedy confirmed that they had been in the area of 54th and South Tacoma Way prior to this incident occurring.

Mardre Combs confirmed during an interview that he was contacted via phone by the occupants of the white Ford Explorer prior to arriving at the gas station on 72nd Street.

Officers took custody of cell phones on each of the occupants from the Ford Explorer and the tan Oldsmobile. These phones were found linked to the following: Jerome Kennedy: Motorola model I930. Conrad Evans: Blackberry model 8320. Kevin Franklin: Blackberry model 8320. Desmond Johnson: Palm model Centro. Mardre Combs: Samsung model SGH-A237. Officers subsequently secured these devices and placed them into property. Your affiant has followed forensic protocol for these cellular phones. The devices that were still powered on were removed from the network connectivity to prevent the destruction or altering of evidence.

Detective also interviewed the two males, Markus Jenkins and Curtis Hudson, who were in maroon Oldsmobile Cutlass (Wa. 790PSG) with Ragland and the time of his homicide, and determined that the occupants of the white Ford Explorer and the maroon Oldsmobile Cutlass are associated with each other.

A search warrant was served upon the burgundy Oldsmobile subsequent to the homicide. During that search, three cellular telephones were located and collected from with the passenger compartment of the that vehicle. It's believed that theses phones likely belong to Ragland, Hudson and Jenkins. The phones are a Motorola model C168l, Samsung model SGH-A737 and Samsung Blackberry model SGH-I617.

Based on statements and witness accounts, probable cause was developed for Conrad Evans Kevin Franklin, Jerome Kenney and Desmond Johnson for Drive By Shooting. Kevin Franklin, Jerome Kennedy and Desmond Johnson were also charged with Unlawful Possession of a Firearm as was Mardre Combs. There were all booked into the Pierce County Jail for the listed charges.

Jerome Kennedy was able to post bail and was released from jail during the early morning hours of June 1st 2009. After his release but prior to his arraignment, Jerome Kennedy contacted the Detective Nist and requested to speak with detectives regarding the shootings. He was picked up at his residence by Detectives and was transported to the police station where he was questioned. He ultimately gave a taped statement and promised to cooperate fully with investigators.

Kennedy said that he and the occupants of the Explorer had been at the Friendly Duck restaurant during the early morning hours of May 31st 2009. Around closing time, he began receiving a series of phone calls from two people he referred to as his "brothers", Jonathan Kyle Ragland and Curtis Hudson. Both indicated that they were at the 54th Street Pub and were in need of assistance as they were outnumbered by rivals of the street gang Young Gangster Crips. One call indicated that a person known by the moniker

of Lil T-Lay had probably retrieved a handgun out of the trunk of his vehicle.

Kennedy related that approximately a week before he and Hudson had got into a fight with members of this gang and had been badly outnumbered. He had been knocked unconscious in that fight and a gold chain he had been wearing around his neck had been taken from him. A YGC member named Lil T-Lay had taken his chain as he was lying on the ground after being knocked out.

Because of the calls from his brothers and the previous history with the Young Gangster Crips , Kennedy and the occupants of the Explorer responded to the rear (east) parking lot of the 54th Street Pub to meet up with Hudson, Ragland and a Markus Jenkins. At the Pub, Kennedy had observed Lil T-Lay closely watching Hudson, Ragland and Jenkins while they occupied the burgundy Oldsmobile Cutlass. Kennedy observed Lil T-Lay get into the rear passenger seat of a midsize dark green Dodge car prior to leaving the parking lot. As the green Dodge left the parking lot, the white Ford Explorer that Kennedy was in followed behind it onto South 56th Street. When the Dodge turned northbound onto South Cedar Street the Explorer followed. Kennedy said that when the Explorer made the turn onto South Cedar Street, the occupant(s) of the Dodge began firing at the Explorer. Kennedy said that he ducked down to avoid being hit by gun fire. He reached into the back seat of the Explorer and retrieved a handgun that he had previously learned was there. He said that he then fired the gun out his widow into the air in an attempt to scare the occupants of the green Dodge and a second blue car which was also following.

When the green Dodge left the area, the Explorer turned the opposite direction and headed toward I-5. As they were entering the on-ramp to I-5 at 56th Street and Tacoma Mall Boulevard, more shots were fired at the Explorer. Kennedy said these shots caused the driver of the Explorer to inadvertently drive into a ditch, causing the damage to the vehicle and the subsequent events leading to the arrests at the Chevron.

Kennedy said that on the morning of June 1st 2009, after he had been released from jail, Curtis Hudson had been at his residence. Hudson had either called or had received a call from Lil T-Lay and a conversation had ensued. Hudson had the conversation on speaker phone so that Kennedy could hear what was being said. Kennedy said that he recognized the voice on the phone as belonging to the person he known as Lil T-lay. During the call, the person identified himself as Lil T-Lay from YGC and bragged about having shot Kyle (Jonathan Kyle Ragland). He was also implying that he was ready to shoot others.

After the interview with Kennedy he was shown a photo montage consisting of 6 photographs. Kennedy studied the photographs and then pointed to a photo of Johnny Morris and identified him as Lil T-Lay. He said the person pictured was the one he saw entering the green Dodge prior to leaving the

54th Street Pub and the person who had bragged on the phone that he had shot Ragland.

Kennedy said that over the course of the past week he has had phone conversations with Lil T-Lay concerning the theft of his chain. He has Lil T-Lay's cellular phone number in his phone under the heading of LT Lay. The number is listed as 253-495-9568.

Curtis Hudson is a known member of the Hilltop Crips. Markus Jenkins is a member of the 34th Street Mafia and the deceased, John Ragland, is an associate of both gangs. Cutis Hudson reluctantly informed your affiant that this incident could be related to a theft of a necklace from last week. He also stated that the members of the YGC (Young Gangster Crips) may have various issues with him.

Based upon these circumstances, your affiant believes that the data contained within these handsets will aid in both of these investigations. Furthermore, your affiant must search the handsets to determine the assigned phone number to each phone. This number must be surrendered for proper legal demands to each network provider to show account history and call detail records (tower location).

Your affiant has received numerous levels of cellular forensic training and is a certified Mobile Forensic Cell Phone Examiner. The combination of this specific training and work on several violent crimes where cell phones were used has had consistent results. The results are that cell phones document geographically where they are when being used. This also includes a date and time. They also are a preferred method of society communication, and are used by most everyone. The devices typically have the ability to store text, images and other data. Among past findings (on the actual handset) have been gang images, confessions through text, weapon images, call history to associates/victims and other stored criminal notations. Your affiant has also located deleted data on handsets that has been used in the criminal investigations.

Dated this 2nd Day of June, 2009

#388

Detective John Bair #388, TPD

2nd day of June, 2009.

SUPERIOR COURT JUDGE

Case Number: 09-1-02724-4 Date: June 17, 2016
SerialID: 6E0F7DF7-C0A1-4FF0-8059A7ADD3F99E17
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 17 day of June, 2016

Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Jun 17, 2016 10:25 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: 6E0F7DF7-C0A1-4FF0-8059A7ADD3F99E17**.
This document contains 12 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

PIERCE COUNTY PROSECUTOR

June 17, 2016 - 11:22 AM

Transmittal Letter

Document Uploaded: 1-prp2-475146-Response.pdf

Case Name: PRP of Franklin
Court of Appeals Case Number: 47514-6

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us